Office Supreme Court U.S.
FILED
JAN 14 1901
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 545

In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY,
PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

CHARLES CARROLL AND
JOSEPH W. CARROLL,
Attorneys for Petitioner.

T. H. THOMASON, PRINT, 528 NATCHEZ STREET, N. O.

34955

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. .....

In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

Now comes The American Sugar Refining Company, a corporation, petitioner, and applies to the Supreme Court of the United States for leave to file the petition, herewith presented as part hereof, for a writ of mandamus to com-

mand the Judges of the United States Circuit Court of Appeals for the Fifth Circuit to hear, try and adjudge a certain cause entitled, "The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error," No. 920, November Term, 1899, on the docket of said Circuit Court of Appeals; the said writ of mandamus being prayed to be issued only in the event that this Honorable Court shall, in its discretion and judgment, deny the petition herewith filed for a writ of *certiorari* in the same cause.

THE AMERICAN SUGAR REFINING COMPANY,
Petitioner,
By CHARLES CARROLL AND
JOSEPH W. CARROLL,
Its Attorneys at Law.

34956

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. .....

In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the American Sugar Refining Company, a corporation organized and existing under the laws of the

State of New Jersey, respectfully shows to this Honorable Court as follows:

1. That on June 14th, 1899, the City of New Orleans brought suit by rule, in the Civil District Court for the Parish of Orleans, Louisiana, as provided by the laws of Louisiana, against the American Sugar Refining Company for a City license tax for the year 1899, for the sum of six thousand two hundred and fifty dollars, with two per cent. per month interest thereon from March 1st, 1899, until paid, claiming said City license tax solely by virtue of the laws of the State of Louisiana and an ordinance of the City of New Orleans; the said tax being claimed from defendant as an occupation tax for carrying on the business of refining sugar and molasses, or either of them, in said City of New Orleans in the year 1899;

2. That thereafter and before the expiration of the delay fixed by the laws of the State of Louisiana for answering, the said defendant, the American Sugar Refining Company, petitioned the said Civil District Court for an order removing said suit to the Circuit Court of the United States for the Eastern District of Louisiana, the said petition for removal being based solely upon the ground that the defendant was a corporation of the State of New Jersey, and the plaintiff, the City of New Orleans, a corporation of the State of Louisiana; which said petition was granted by said Civil District Court, and the bond required to be given was given and filed;

3. That thereafter and before the next succeeding term of the United States Circuit Court for the Eastern District of Louisiana, said defendant, the American Sugar Refining Company, caused to be lodged in said Circuit Court of the

United States a duly certified transcript of the record of said suit in said Civil District Court, which transcript was filed and the suit docketed in said United States Circuit Court under the No. 12,827;

4. That, thereafter, by order of Court, said City of New Orleans, plaintiff, reformed its pleadings in some parts, the reformed petition claiming a license tax from defendant for the occupation of refining sugar and molasses for the year 1899 in the sum of six thousand two hundred and fifty dollars, with interest as hereinabove set forth, and as originally claimed in said rule taken in said Civil District Court; the only difference of substance between said reformed petition and the original rule being that said reformed petition omitted the former prayer for recognition of a lien and privilege on defendant's property and for an injunction against defendant's carrying on its business;

5. That, thereafter, defendant answered the said suit, claiming in its said answer:

First. That it was a manufacturer, and as such exempt from license taxation under Article 229 of the Constitution of the State of Louisiana of 1898, which exempts all manufacturers from State and municipal license taxation, except those of distilled, alcoholic and malt liquors, tobacco, cigars and cotton seed oil; and

Second. That the ordinance of the City of New Orleans under which said tax was claimed was based upon Act No. 171 of the General Assembly of Louisiana of 1898, and that the said Act was in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it exempted from license taxation planters and farmers who refine their own sugar and molasses, and thereby sought

to make an illegal discrimination against those sugar refiners who were not planters and farmers, and denied to defendant, as one of such sugar refiners, the equal protection of the laws of the State of Louisiana; and that the said Act and City ordinance based thereon were therefore unconstitutional and void as to defendant;

6. That thereafter, the said suit was tried before the Court and a jury, and evidence was adduced showing the nature and character of defendant's business in support of its claim that it was a manufacturer, which evidence of the defendant was uncontradicted in every particular; the said evidence also showing that the gross receipts of defendant's business were of such amount that, if liable at all for the license tax, it was liable in the sum claimed; and defendant filed also an exception of no cause of action;

7. That thereupon and at the close of the evidence, defendant requested the Court to charge the jury as a matter of law and upon the whole evidence to render a verdict in defendant's favor; and the plaintiff requested the general charge in plaintiff's favor, which charge requested by the plaintiff was given by the Court and verdict and judgment were rendered in favor of plaintiff for the amount claimed, to all of which defendant duly excepted; and the bill of exceptions was duly settled and signed by the presiding Judge;

8. That thereafter, defendant applied for and obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to review said judgment, filed an assignment of errors and gave bond to operate as a *supersedeas;* and perfected and completed the said writ of

34953

error by duly lodging the transcript of record in said Circuit Court of Appeals;

9. That, in due course, the said cause was argued orally and by brief in said Circuit Court of Appeals upon the merits and the points raised by the assignment of errors, and at the close of argument the Court took the case under advisement;

10. That, on the 29th day of May, 1900, a judgment was rendered by said Circuit Court of Appeals, dismissing the said writ of error upon the ground that said Circuit Court of Appeals had no jurisdiction thereof, inasmuch as it was claimed in the suit that a law of the State of Louisiana was in contravention of the Constitution of the United States, that said question was the controlling question in the case and that exclusive jurisdiction to review said judgment of the Circuit Court was vested in the Supreme Court of the United States by the Fifth Section of the Act of Congress of March 3d, 1891 (reported in 104 Federal Reporter, 2); the said judgment being rendered by a majority of the Judges of said Circuit Court of Appeals, his Honor Judge McCormick dissenting.

11. That, thereafter, plaintiff in error, your petitioner, applied for a rehearing upon said question of jurisdiction, setting up that said question of jurisdiction had not been raised by the defendant in error and had not been suggested by the Court during the oral argument, and setting forth that the said Circuit Court of Appeals had jurisdiction of the said matter under the terms of the Sixth Section of the Act of Congress of March 3d, 1891, as the said suit was one between citizens of different States and the jurisdiction of the Circuit Court had been sought and had

attached solely because of the diversity of citizenship of the parties to said suit; which said petition for rehearing the said Court of Appeals took under advisement upon the briefs allowed to be filed therein;

12. That thereafter, on the twentieth day of November, 1900, the said Circuit Court of Appeals denied a rehearing in the said matter and affirmed its previous judgment dismissing the said suit for want of jurisdiction.

13. Petitioner shows that a certified copy of the entire record of the said case in the said Circuit Court of Appeals, including the judgments and opinion rendered therein, is herewith furnished and filed as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals, and the same is marked "Exhibit A."

14. Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous and that said Circuit Court of Appeals has jurisdiction in law to try and adjudge the said case upon its merits, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress entitled, "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes, approved March 3d, 1891," the said case being made final in the said Circuit Court of Appeals by the said Act, as being a suit between citizens of different States.

15. Petitioner shows that, if the Court shall conclude that the Circuit Court of Appeals had jurisdiction of the

said cause, this Honorable Court should nevertheless grant the writ of *certiorari* herein prayed for, inasmuch as the said cause involves other and grave questions of law, which should have and receive the consideration and determination of this Honorable Court; that one of the questions involved in said cause is the right of the Federal Court to find and determine for itself the definition of a word in common use in the language of the country, and to apply the same to the laws of a State of the Union;

16. That if the Court shall reach the conclusion that the said Circuit Court of Appeals was without jurisdiction to try and adjudge the said case, as was determined by said Circuit Court of Appeals, your petitioner represents that this Honorable Court should nevertheless grant the writ of *certiorari* herein prayed for, because at the time that the said writ of error was sued out from said Circuit Court of Appeals, an unbroken line of decisions of this Honorable Court had adjudged and declared the appellate jurisdiction of the Circuit Court of Appeals, under Section 6 of the Act of March 3d, 1891, to extend to all cases in which the jurisdiction of the Circuit Court had been sought and had attached solely by reason of the diversity of the citizenship of the parties to the suit, notwithstanding constitutional questions may have been thereafter injected into the suit by answer or otherwise. *American Const. Co. vs. Jacksonville Ry., 148 U. S. 372 (382); Colorado Cent. Min. Co. vs. Turck, 150 U. S. 138 (144); Borgmeyer vs. Idler, 159 U. S. 408 (414); Press Pub. Co. vs. Monroe, 164 U. S. 105 (112); Ex parte Jones, 164 U. S. 691 (692, 693); Third St. Ry. Co. vs. Lewis, 173 U. S. 457 (460); Pope vs. Louisville Ry. Co., 173 U. S. 573 (578);*

17. That the authorities upon which the majority opinion of said Circuit Court of Appeals rests, even if they be held to establish the correctness of the judgment of said Circuit Court of Appeals, to-wit., *Carter vs. Roberts, 177 U. S. 496*, and *Railroad Co. vs. Thiebaud, 177 U. S. 615*, were rendered by this Honorable Court after the writ of error in this case had been sued out from the Circuit Court of Appeals, and that the time has now expired within which a writ of error can be obtained from this Honorable Court so as to stay the execution of the judgment of the Circuit Court.

18. Petitioner represents that having taken and perfected its said writ of error at a time when the jurisprudence appeared to have been established as vesting the appellate jurisdiction in such cases solely in the Circuit Court of Appeals, it would be a great hardship upon, and practically a denial of justice to, petitioner to refuse to petioner a hearing in the said cause in this Honorable Court, should it be determined that said Circuit Court of Appeals has no jurisdiction in the premises.

19. Petitioner shows that if this Court shall conclude that said Circuit Court of Appeals had jurisdiction to try and adjudge the said cause, and if this Court shall in its judgment and discretion see fit to to deny the writ of *certiorari* herein prayed for, then, that a writ of mandamus should be issued out of this Honorable Court to the Judges of said Circuit Court of Appeals, directing them to try and adjudge said cause, the said writ to be issued after such notice to show cause as the Court may determine is proper and according to the practice usual in such cases.

34960

20. Petitioner shows that it has not, as a matter of right, an appeal or other remedy to review the said judgment by said Circuit Court of Appeals, save by one of the writs herein prayed to be issued.

21. The said case was decided in said Circuit Court of Appeals upon the ground that the controlling question involved was the claim that a law of the State of Louisiana was in contravention of the Constitution of the United States; that petitioner is advised that said judgment denying its jurisdiction by said Circuit Court of Appeals was erroneous and that the uniform construction of said Act of Congress of March 3d, 1891, by this Honorable Court, has been that wherever the jurisdiction of the Circuit Court was primarily invoked upon the ground of diversity of citizenship of the parties to the suit, the Circuit Court of Appeals is vested with exclusive appellate jurisdiction in such cases, notwithstanding the defendant in said suit may have raised in his defense a question involving the construction and application of the Constitution or laws of the United States; that this Honorable Court has jurisdiction to review the judgments of the Circuit Court upon the ground of a Federal question being involved only when the plaintiff in the Circuit Court has founded his case upon some constitutional or Federal right or privilege and the jurisdiction of the Circuit Court has attached by reason of such constitutional or federal right being raised and relied on by the plaintiff.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to said United States Circuit

Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals in said case, therein entitled *The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899*, to the end that said case may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said decree of the said Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And petitioner further prays that it may be permitted to file this application for a writ of mandamus, in the alternative; and, if this Honorable Court shall, in its judgment and discretion, see fit to deny petitioner's prayer for a writ of *certiorari*, that thereupon, a rule shall issue directed to the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit, requiring them by a day certain, to answer the exigency of this petition, and show cause, if any they have, why a writ of mandamus should not issue by the Supreme Court, commanding and directing them to hear, try and adjudge the said cause; and that upon the answer of the said Judges of said Circuit Court

34961

of Appeals, this Court do issue a peremptory writ of mandamus directing and compelling the said Judges to act and do as herein prayed.

And your petitioner will ever pray, etc.

THE AMERICAN SUGAR REFINING COMPANY,
Petitioner,

By CHARLES CARROLL AND
JOSEPH W. CARROLL,
Its Attorneys at Law.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

JACKSON T. WITHERSPOON, being duly sworn, deposes and says: that he is the general and special agent and attorney in fact in the City of New Orleans and the State of Louisiana of The American Sugar Refining Company; that said Company has no general officer in said State of Louisiana, and that affiant is the chief representative of said Company in said City and State, with full power to represent said Company in suits by and against it; that affiant has read the foregoing petition and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me
this.....day of January, A. D. 1901.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

JOSEPH W. CARROLL, being duly sworn, deposes and says: that he is one of the attorneys at law of The American Sugar Refining Company; that, as such, he has had personal charge for the said Company of the case in the foregoing petition mentioned, in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me
this.....day of January, A. D. 1901.

Office Supreme Court, U.S.
FILED
JAN 14 1901
JAMES H. McKENNEY,
Clerk.

No. 535.

Brf. of Carroll & Carroll for Pet'r.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 535

Filed Jan. 14, 1901.

In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY,
PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS.

CHARLES CARROLL AND
JOSEPH W. CARROLL,
Attorneys for Petitioner.

JANUARY, 1901.

T. H. THOMASON, PRINT, 926 NATCHEZ STREET, N. O.

34563

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. .....

In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS.

The question involved in this application is as to the appellate jurisdiction of the Circuit Court of Appeals, under the Appellate Courts Act of March 3d, 1891.

The City of New Orleans sued the American Sugar Refining Company in the Civil District Court for the Parish of Orleans, Louisiana, for the sum of $6,250.00, with statutory interest, as being due for a license tax for the year 1899 as a sugar refiner in the City of New Orleans.

The defendant in due time filed a petition in the State Court for removal of the suit to the United States Circuit Court for the Eastern District of Louisiana, setting up in its petition for removal that it was, at the time of the institution of the suit, and still was, a corporation organized under the laws of New Jersey and domiciled in that State, and that the plaintiff was at the time of the institution of the suit, and still was, a municipal corporation under the laws of Louisiana. This petition was duly verified, the proper order for removal was obtained, bond was given and a transcript of the proceedings in the State Court was duly lodged in the United States Circuit Court for the Eastern District of Louisiana.

After proceedings not pertinent to the question here involved, the City filed a reformed petition, claiming the license tax as originally claimed, but omitting its former prayer for a lien upon defendant's property to secure the tax and also its prayer for an injunction to restrain defendant from prosecuting its business.

Defendant answered in the Circuit Court: *First*, that it was a manufacturer and as such was exempt from municipal license taxation under the terms of Article 229 of the Constitution of Louisiana of 1898, which exempts all manufacturers save a few specified excepted ones; and, *Second*, that the ordinance of the City of New Orleans under which the license tax was claimed was in contravention of the

34964

Fourteenth Amendment to the Constitution of the United States, in that it was based upon Act No. 171 of the General Assembly of Louisiana of 1898, which Act was in contravention of the Fourteenth Amendment because it sought to make an illegal discrimination against sugar refiners who were not planters or farmers, and in favor of sugar refiners who were planters or farmers, by exempting the latter from all license taxation and by imposing a tax upon the former; that under Article 229 of the Constitution of Louisiana, municipal corporations were prohibited from exacting a greater license tax than the State, and that as the State law exacting a tax was unconstitutional and no legal tax was thereby exacted, the City ordinance exacting the license tax for the same occupation was also unconstitutional.

Upon the trial of the case in the Circuit Court, defendant admitted that it was a sugar refiner in the City of New Orleans, and that its gross receipts exceeded the amount charged in plaintiff's petition. The City thereupon offered in evidence the municipal ordinance levying the tax and rested. Defendant produced witnesses who established the nature and character of the defendant's business, the character of the operations resorted to in the refining of sugar, the changes in the material used to produce the refined product and the processes necessary for the accomplishment of that result. Defendant's testimony was uncontradicted in any particular; there was absolutely no controversy as to the facts constituting the nature, character and results of defendant's business. Defendant, also, during the progress of the trial, filed an exception of no

cause of action predicated on the theory that a sugar refiner is, as a matter of law, a manufacturer.

At the close of the testimony, defendant requested the Court to charge the jury to bring in a verdict in its favor, both upon the ground that defendant was a manufacturer and therefore exempt, and upon the ground that the said ordinance was in contravention of the Fourteenth Amendment to the Constitution of the United States; and plaintiff also requested the general charge in its favor.

After argument, the Court charged the jury to bring in a verdict for the amount claimed by the plaintiff and denied the charges requested by the defendant, all of which was duly excepted to by defendant, and a bill of exceptions embodying the exceptions taken was duly settled and sealed by the presiding Judge.

Defendant applied for and obtained a writ of error from the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the Circuit Court. The errors assigned were that the Circuit Court erred: (1) in refusing the charge that defendant was a manufacturer, as a matter of law and upon the whole evidence, and therefore exempt; (2) in refusing to charge that the municipal ordinance under which the license tax was claimed was in contravention of the Fourteenth Amendment to the Constitution of the United States; and (3) in charging the jury to bring in a verdict for the plaintiff.

Bond for a *supersedeas* was given and in due course the transcript of the record was lodged in the Circuit Court of Appeals for the Fifth Circuit.

The cause came on to be heard in the Circuit Court of Appeals and was argued upon the errors assigned.

34965

The Court of Appeals thereafter rendered a judgment dismissing the suit for want of jurisdiction upon the ground that the controlling question in the cause was one involving the application and construction of the Constitution of the United States, and that the Supreme Court of the United States is, under the Fifth Section of the Appellate Courts Act of March 3d, 1891, vested with sole appellate jurisdiction in such cases.

The plaintiff in error applied for a rehearing and submitted a brief thereon. The Court allowed the petition for rehearing to be filed and took the same under advisement. On November 20th, 1900, the Court denied the petition for rehearing without assigning reasons therefor.

Petition is now made to this Honorable Court for a writ of *certiorari* requiring the Circuit Court of Appeals to send up the case to this Court; or, if a writ of *certiorari* be not granted, in the alternative for a writ of mandamus.

We conceive that the petition for a writ of mandamus, in the alternative, is properly addressed to the Court, because of the circumstances of the case and upon the authority of **American Construction Co. vs. Jacksonville Ry. Co., 148 U. S. 372.**

We submit that the Circuit Court of Appeals has jurisdiction of the writ of error. The jurisdiction of the Circuit Court was sought and attached solely because of the diverse citizenship of the parties to the suit, and under repeated decisions of this Court, the ground upon which the jurisdiction of the Circuit Court attaches is alone to be looked to in determining the character of the suit for the purposes

of an appeal or writ of error under the Act of March 3, 1891.

In considering a case involving the appellate jurisdiction of the Courts of Appeals under the Sixth Section of the Act of March 3d, 1891, MR. JUSTICE GRAY said:

"The effect of these provisions is that, in any case in which the jurisdiction of the Circuit Court depends entirely on the citizenship of the parties (as in the cases now before us), but in which the jurisdiction of that Court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the Circuit Court of Appeals only; and the judgments of the latter Court are final, unless either that Court certifies questions or propositions of law to this Court, or else this Court, by *certiorari* or otherwise, orders the whole case to be sent up for its review and determination." **American Construction Co. vs. Jacksonville Ry., 148 U. S. 372 (382).**

In a subsequent case, MR. CHIEF JUSTICE FULLER delivered the opinion of the Court, saying in part:

"The jurisdiction of the Circuit Court was invoked December 2d, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted, on any other ground. The Federal question now suggested did not emerge until the defendant set up its second defense. * * *

"The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

"If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented.

"We are of opinion that the judgment of the Circuit Court of Appeals was final under the sixth section, and

that the writ of error cannot be maintained." **Colorado Central Mining Co. vs. Turck, 150 U. S. 138 (144).**

The identical question here involved appears to have been considered in a recent case. MR. CHIEF JUSTICE FULLER, speaking for the Court, after quoting at length from TURCK'S CASE, said further:

"Applying these principles to the case at bar, it is apparent that this writ of error will not lie. The jurisdiction of the Circuit Court was invoked by the issue of summons September 15th, 1892, followed by the filing of the statement of claim or declaration, September 22d, 1892, and therefrom it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground. * * *

"The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced and to that point of time the inquiry must necessarily be referred. Had the case been brought to this Court from the Circuit Court, the writ of error could not have been entertained." **Borgmeyer vs. Idler, 159 U. S. 408 (414).**

To the same effect is **Press Publishing Co. vs. Monroe,** in which case MR. JUSTICE GRAY said:

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2000.00, showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different States. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the fore-

going considerations and as was expressly adjudged in Colorado Co. vs. Turck, above cited, is insufficient to support the jurisdiction of this Court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed for want of jurisdiction." **Press Publishing Co. vs. Monroe, 164 U. S. 105 (112).**

At the same term, in another case, MR. JUSTICE BROWN said:

"The Circuit Court of Appeals refused to allow an appeal in this case upon the ground that its jurisdiction of the case was 'dependent entirely upon the opposite parties to the suit or controversy being citizens of different States,' and, therefore, under Section Six of the Court of Appeals Act of March, 1891, the decree was final and not the subject of an appeal of this Court. * * *

"In this case the original bill averred the complainant to be a citizen of Pennsylvania, and the defendant a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the Act of 1888 took effect, it must be deemed a suit dependent upon citizenship alone. But, even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship." **Ex parte Jones, 164 U. S. 691 (692, 693).**

Even when a Federal question is raised by the plaintiff in a supplemental bill, the Circuit Court of Appeals has appellate jurisdiction when the jurisdiction of the Circuit Court was originally invoked on the ground of diversity of citizenship of the parties to the suit.

MR. CHIEF JUSTICE FULLER, speaking for the Court in **Third St. Ry. Co. vs. Lewis,** said:

"Although the record does not contain the original bill, it is apparent that the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship, and that the interest of appellants in the mortgaged premises was acquired after the commencement of the action. * * *

"This supplemental bill made appellant a party defendant as claiming an interest, but the jurisdiction still rested on diversity of citizenship. The decree of the Circuit Court of Appeals was, therefore, made final by the statute, and the appeal cannot be sustained. * * *

"It is thoroughly settled that under the Act of August 13, 1888, C. C. 886, 25 Stat. 454, the Circuit Court of the United States has no jurisdiction, either original or by removal from a State Court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. *Tennessee vs. Union and Planters' Bank, 152 U. S. 454; Metcalf vs. Watertown, 128 U. S. 586, 589; Colorado Central Mining Co. vs. Turck, 150 U. S. 138.* If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defense. And so when jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings. *Ex Parte Jones, 164 U. S. 691.*" **Third St. Ry. Co. vs. Lewis, 173 U. S. 457 (460).**

Again, in **Pope vs. Louisville Ry. Co.,** MR. CHIEF JUSTICE FULLER said:

"The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the Circuit Court of Appeals, the decision of that Court would have been final under the statute. And as this suit was in effect merely in collection

of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the Circuit Court of Appeals therein.

"And this is true, although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked." **Pope vs. Louisville Ry. Co., 173 U. S. 573 (578).**

These decisions constitute an unbroken line, and all were rendered without dissent.

We have examined the cases cited by the majority of the Court of Appeals in support of its conclusion that that Court is without jurisdiction, and it appears that in each case where the appellate jurisdiction of the Circuit Court of Appeals was denied, and the jurisdiction of the Supreme Court sustained, the jurisdiction of the Circuit Court had been invoked and had attached by reason of the subject matter of the suit, a Federal question having been raised in each instance by the plaintiff's statement of his own case in his original bill or declaration. Such being the case, the jurisdiction of the Circuit Court of Appeals did not attach under Section 6 of the Act of March 3d, 1891, and the jurisdiction of the Supreme Court did attach under Section 5 of the same Act. In other words, the jurisdiction of the Circuit Court was not dependent upon the citizenship of the parties, as it is in the case at bar, and as it was in each of the cases cited herein which were considered by the Supreme Court.

But even if the decisions in **Carter vs. Roberts, 177 U. S. 496,** and **Railroad Co. vs. Thiebaud, 177 U. S. 615,** relied on by the majority Judges of the Court of Appeals, sustain the

conclusion of that Court, we respectfully submit that at the time the writ of error in this case was sued out from the Court of Appeals, the unbroken line of authorities hereinabove cited warranted the action of the plaintiff in error in suing out the writ of error from the Court of Appeals. Had the writ of error been sued out from the Supreme Court, it would have been done in the face of the prior adjudications of this Court as we understand them now and as we understood them at the time the writ of error was obtained.

The warning conveyed by the CHIEF JUSTICE in **Borgmeyer vs. Idler,** quoted above, was too plain to be disregarded:

"The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this Court from the Circuit Court the writ of error could not have been entertained."

We respectfully submit, therefore, that under the circumstances of this case, a writ of *certiorari* should be granted whether the Court shall conclude that the Court of Appeals has or has not jurisdiction.

There is no doubt, as we conceive, as to the right of this Court to remove the case from the Court of Appeals at any stage of the proceedings in that Court. **The Three Friends, 166 U. S. 1 (49); Amer. Const. Co. vs. Jacksonville Ry., 148 U. S. 372 (385).**

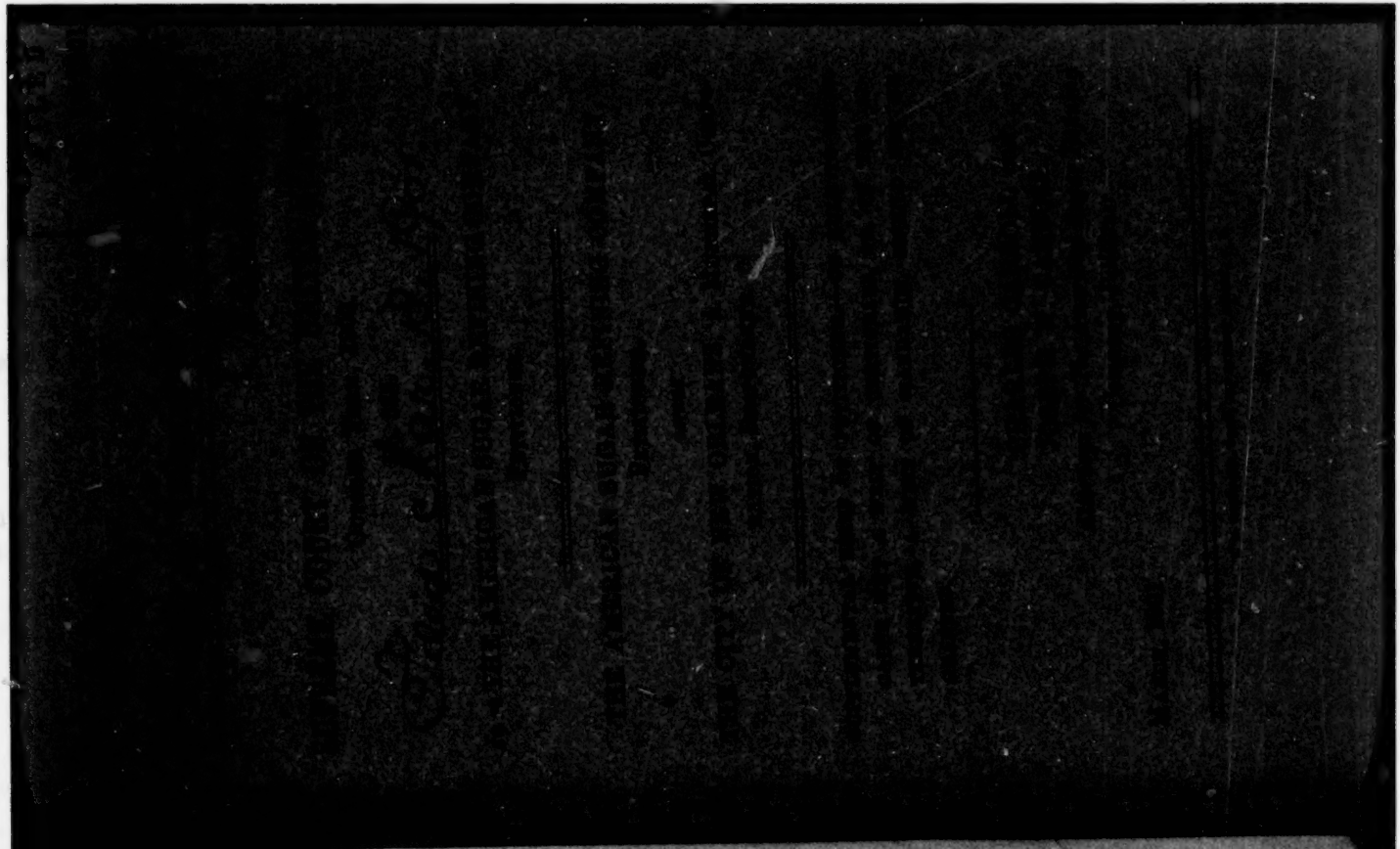
If, however, the Court shall conclude that the Court of Appeals has jurisdiction, but shall, in its judgment and

discretion, deny a writ of *certiorari*, we submit, in such event, that a rule should issue against the Judges of the Court of Appeals requiring them to show cause on a day fixed why a writ of mandamus should not issue, directing them to hear, try and adjudge the cause; and that a writ of mandamus should be issued in due course.

Respectfully submitted,

CHARLES CARROLL AND
JOSEPH W. CARROLL,
Attorneys for Petitioner.

JANUARY, 1901.



34971

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 535.

In re THE AMERICAN SUGAR REFINING COMPANY.
PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY,
PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.—ON RULE TO SHOW CAUSE WHY A WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, A WRIT OF MANDAMUS, SHOULD NOT BE GRANTED.

May it please your Honors:

As the decision of this Court in *Loeb vs. Trustees of Columbia Township, 179 U. S. 472,* has been reported and has come to our knowledge since the filing of the petition in this matter, and as counsel for respondents have since filed a brief in opposition to the petition, we respectfully

ask leave to submit this supplemental brief in support of the petition.

It is said by counsel for respondents that in the cases cited in our former brief (*American Const. Co. vs. Jacksonville Ry., 148 U. S. 372; Colorado Central Mining Co. vs. Turck, 150 U. S. 138; Borgmeyer vs. Idler, 159 U. S. 408; Press Pub. Co. vs. Monroe, 164 U. S. 105; Ex parte Jones, 164 U. S. 691; Third St. Ry. Co. vs. Lewis, 173 U. S. 457; and Pope vs. Ry. Co., 173 U. S. 573*), the inquiry was neither as to the appellate jurisdiction of this Court under the fifth section of the Appellate Courts Act of March 3d, 1891, nor as to the appellate jurisdiction of the Court of Appeals under the sixth section, but was as to the appellate jurisdiction of this Court over the Court of Appeals under the sixth section of that act.

Assuming this to be true, the discussion in each one of those cases necessarily involved consideration of the appellate jurisdiction of this Court and the Court of Appeals under those sections.

The act provides, section 6:

"The judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

In every one of the cases cited the Court has construed the "*jurisdiction*" referred to above as being the jurisdiction of the Circuit Court. The result, therefore, of such construction is necessarily that the judgment of the Court of Appeals is final in those cases in which the jurisdiction of the Circuit Court is dependent entirely upon diverse cit-

izenship. If, then, the judgment of the Court of Appeals is, by the act, made final in *all* cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship of the parties, by necessary implication the Court of Appeals has power to review all judgments of the Circuit Court in which the jurisdiction of the Circuit Court has attached solely by reason of such diversity of citizenship. There is, we submit, no escape from that conclusion.

Hence, the discussions in the cases cited necessarily embraced consideration of the respective jurisdictions of this Court and the Court of Appeals, and are pertinent to the present issue.

But it is said that the fifth section of the act confers appellate jurisdiction upon this Court "in any case in which the law of a State is claimed to be in contravention of the Constitution of the United States." Taken alone such language is surely broad enough to embrace all cases in which a federal question is at issue, whether raised by plaintiff or by defendant. But taken in connection with the part of the sixth section quoted above, with the construction uniformly put upon it by this Court, it would seem to be limited to those cases in which such constitutional question is raised which do not depend solely upon diverse citizenship as a ground of jurisdiction of the Circuit Court.

Even in the *Loeb case* there was no denial of the jurisdiction of the Court of Appeals. On the contrary, *Mr. Justice Harlan* seems to concede the right of appeal to the Court of Appeals:

"It is true that the plaintiff might have carried this case

to the Circuit Court of Appeals, and, a final judgment having been rendered in that Court upon his writ of error, he could not thereafter have invoked the jurisdiction of this Court upon another writ of error to review the judgment of the Circuit Court; for, as said in Robinson vs. Caldwell, 165 U. S. 359, 362, 'it was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals,' although the latter Court, before disposing of a case which might have been brought here directly from the Circuit Court, may certify to this Court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the Circuit Court of Appeals, and thereby cut himself off from the right to have this Court declare whether the Circuit Court erred in holding that the State law upon which he relied for judgment was repugnant to the Constitution of the United States." *Loeb vs. Trustees of Columbia Township, 179 U. S. 472.*

In that case, the Court still construed the sixth section as making final the judgments of the Court of Appeals in all cases in which the jurisdiction of the Circuit Court attaches solely on the ground of diverse citizenship. So that it would seem that the *Loeb case* establishes a concurrent appellate jurisdiction in such cases in this Court and the Court of Appeals, neither exclusive of the other, except that both cannot exercise it in the same case.

But counsel for respondents say that, under the doctrine of *Carter vs. Roberts, 177 U. S. 496*, it was discretionary with the Court of Appeals whether it would take or decline jurisdiction, and that we took the risk of the Court not hearing the case. The answer to that is that it would be idle to give a right of appeal and then leave it optional

with the appellate court whether it would hear or not hear.

In the first place, *Carter vs. Roberts* was not a case in which the jurisdiction of the Circuit Court attached solely because of diversity of citizenship; the jurisdiction was based on the assertion of a federal right. The Court of Appeals might well have declined jurisdiction in that case, because it is not among the classes of cases included in the sixth section. But this Court held, as we appreciate the decision, that Carter having invoked the appellate jurisdiction of the Court of Appeals was estopped from taking another chance of favorable decision from this Court in the same case.

In the next place, as the judgment of the Court of Appeals is final in *all* cases in which the jurisdiction of the Circuit Court is dependent solely on the diverse citizenship of the parties, the Court of Appeals necessarily has jurisdiction of all those cases; and, as the case at bar is a case in which the jurisdiction of the Circuit Court was dependent solely upon diverse citizenship, therefore the Court of Appeals necessarily has jurisdiction of the case at bar, irrespective of whether this Court might also have jurisdiction.

This conclusion does not deny the jurisdiction of this Court under the fifth section, but its necessary consequence is that there is a class of cases in which the appellate jurisdiction of the Supreme Court and the Court of Appeals co-exists.

No other conclusion is possible, we submit, under the authorities quoted. The uncertainty in the Act of 1891, it

seems to us, lies in the expression in the sixth section, which reads:

"The judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

If the "*jurisdiction*" there mentioned be the jurisdiction of the Circuit Court, as has been uniformly held, then the concurrent appellate jurisdiction of this Court and the Court of Appeals is established in all those cases in which the jurisdiction of the Circuit Court attaches solely because of diversity of citizenship and a constitutional question subsequently arises in the same case. The only construction which would preserve the exclusive appellate jurisdiction of each Court, if we may venture our opinion, would be that the "*jurisdiction*" referred to in the clause of the sixth section above quoted is the jurisdiction of the Court of Appeals; that is, that the judgment of the Court of Appeals is final in all cases in which the jurisdiction of the Court of Appeals is dependent solely on diverse citizenship. Under such a construction the broad meaning of section 5 adopted in the *Loeb case*, would vest this Court with exclusive appellate jurisdiction of all cases coming within its terms, while the Court of Appeals would have no jurisdiction of any case which falls within the terms of section 5. But it would have exclusive and final jurisdiction of all cases in which its jurisdiction is dependent solely upon diversity of citizenship. In all other cases—that is, in all cases not within section 5, and not dependent solely upon diversity of citizenship as a ground of jurisdiction and not within any other exception of section 6—the Court of Appeals would have exclusive but not final jurisdiction.

What we have just said is intended to point the argument that the *Loeb case*, while upholding the jurisdiction of this Court, does not deny the jurisdiction of the Court of Appeals, inasmuch as it seems to concede that the Court of Appeals has jurisdiction of all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diversity of citizenship of the parties.

If, however, the Court shall conclude that it has exclusive appellate jurisdiction of the case at bar, then we submit that, at the time the writ of error was sued out in this case (January, 1900), the judicial expressions in the cases cited in this and our former brief, were such as to justify the opinion that the writ was properly sued out from the Court of Appeals. And we may not improperly add that before the writ was applied for, careful consideration was given to the statute of 1891 and the adjudged cases.

The only case prior to that time which seems in any way opposed to the conclusion reached is *Holder vs. Aultman, 169 U. S. 81*, cited it the *Loeb case*, in which the question of jurisdiction does not appear to have been contested; and the head-note of this case does not indicate consideration of the question to which the *Loeb case* cites it; nor do the digests cite it to any other point than that this Court will determine all questions involved when it has jurisdiction on any ground, on appeal from an inferior federal court.

The time has long since expired when petitioner could stay the judgment of the Circuit Court by a *supersedeas* on a writ of error direct from this Court. The defendant City of New Orleans is amply secured by the bond given on the writ of error from the Court of Appeals; and we respectfully submit that it will be in no manner prejudiced by the

granting of a writ of *certiorari* herein. This is not a case where the petitioner is seeking to have two trials of the same question on appeal; all that it seeks is to have the case heard by an appellate court, and it has been guilty of no negligence, we submit, which should deprive it of that right. In no case cited has the party seeking a review of the judgment of the Circuit Court been denied a hearing in one appellate court, and it appears to have become the settled practice (prior to the *Loeb case*) to invoke the appellate jurisdiction of the Courts of Appeals in all cases of the character of the one at bar, and the Courts of Appeals have uniformly considered such cases as falling within the terms of the sixth section and have exercised appellate jurisdiction therein.

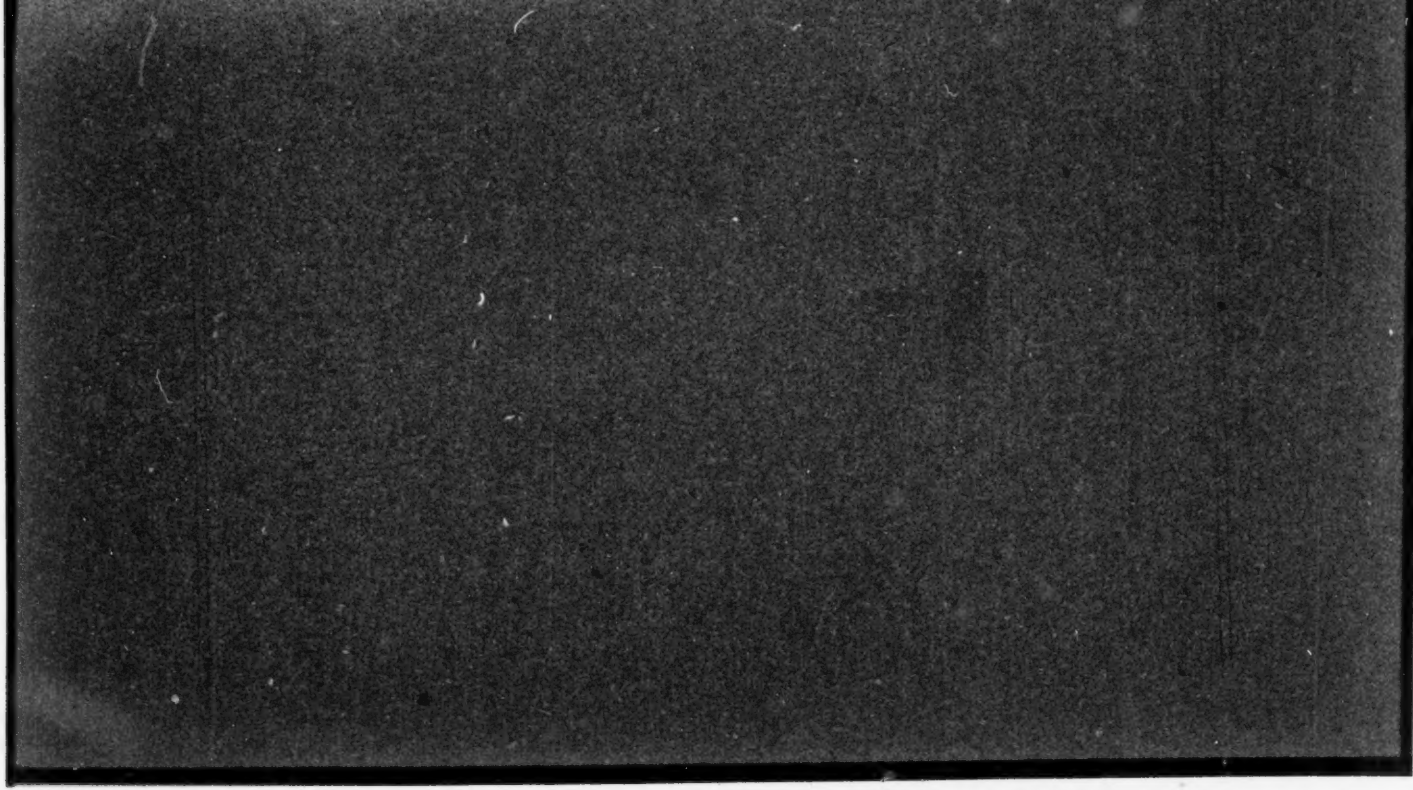
As the case is unquestionably one of a class in which this Court has repeatedly held the judgment of the Court of Appeals to be final and as we have no right to a writ of error from this Court to the Court of Appeals, unless the writ of *certiorari* be granted, petitioner is left in the position of having its writ of error lodged in a Court which, while having final jurisdiction, yet refuses a hearing.

We respectfully submit that relief should be granted petitioner. If the Court of Appeals, either as a matter of law or as a matter of judicial discretion, properly declined to take jurisdiction of the writ of error, then a proper case is made for the exercise by this Court of a writ of *certiorari*.

Respectfully submitted,

CHARLES CARROLL and
JOSEPH W. CARROLL,
Attorneys for The American Sugar Refining Company, Petitioner.

MARCH, 1901.



No. 535.

Motion to set for hearing &c.

Office Supreme Court U. S.
FILED
MAR 6 1901
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1900.

Filed Mar. 6, 1901.

No. 535.

IN RE THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

vs.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Motion to Fix Day for Argument on Return to Rule to Show Cause.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes The American Sugar Refining Company, petitioner, and shows to the court that it desires to be allowed to argue orally, by its counsel, the subject-matter and merits of the rule to show cause herein granted by this honorable court on January 21, 1901; that the said rule to show cause

should, as petitioner is advised, be set down for oral argument according to the rules of practice of this honorable court; that petitioner has notified The City of New Orleans and the Honorable the Judges of the Court of Appeals for the Fifth Circuit, respondents, that petitioner will ask leave of this honorable court to set down the said rule for argument on Monday, March 18, 1901, at 12 o'clock m., or as soon thereafter as counsel may be heard, and that petitioner will, by its counsel, orally argue the merits of the said rule at said hour, leave of court being first had, and that it has heretofore filed a brief herein, a copy of which has been delivered to each of the respondents herein.

Wherefore, the premises considered, petitioner prays that it have leave to argue orally the said cause on Monday, March 18, 1901, or on such other day as the court may fix.

CHARLES CARROLL,
JOSEPH W. CARROLL,
Attorneys for The American Sugar Refining Company, Petitioner.

NEW ORLEANS, LA., *February* 28, 1901.

The undersigned, respondents in the above-entitled cause, hereby acknowledge to have received this day from above-named petitioner a copy of the foregoing motion; and we do further acknowledge to have received a copy of the brief of petitioner, hereinbefore filed, in support of its application for a writ of certiorari or, in the alternative, for a writ of mandamus.

SAM'L L. GILMORE,
City Attorney.

DON A. PARDEE,
Senior Circuit Judge.

No. 535.

Office Supreme Court
FILED
FEB 23 1901
JAMES H. McKENNEY,
Clerk

Brf. of Gilmore for Respondent.

United States Supreme Court.

OCTOBER TERM, 1900.

Filed February 23, 1901.

No. 535.

IN RE THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Brief of the City of New Orleans in opposition to the petition of the American Sugar Refining Company for Writ of Certiorari; or, in the alternative, for Writ of Mandamus.

SAMUEL L. GILMORE,
City Attorney for City of New Orleans.

"The Legal Printer," J. G. Hauser, 913 Camp St., N. O., La.

34978

United States Supreme Court.

OCTOBER TERM, 1900.

No. 535.

IN RE THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Brief of the City of New Orleans in opposition to the petition of the American Sugar Refining Company for Writ of Certiorari; or, in the alternative, for Writ of Mandamus.

STATEMENT OF THE CASE.

This suit was brought by the City of New Orleans in the Civil District Court of the Parish of Orleans against the American Sugar Refining Company, a citizen of New Jersey, to recover the

sum of Six Thousand Two Hundred and Fifty Dollars ($6250), claimed to be due to the city by the defendant for a license for the privilege of carrying on its business in the City of New Orleans under the laws of the State of Louisiana. The suit was removed to the United States Circuit Court of the Eastern District of Louisiana on the petition of the defendant showing the diverse citizenship of the parties.

After the case was removed, defendant filed an answer, setting up two defenses: First, that it was exempt from license taxation by Article 229 of the Constitution of the State of Louisiana, adopted in 1898, and second, that Ordinance 14,884, C. S., of the City of New Orleans, which levied the license sought to be recovered, and which was based on Act 171 of the General Assembly of Louisiana for 1898, was in contravention of the Fourteenth Amendment of the Constitution of the United States.

Upon trial of the case there was judgment for plaintiff, and defendant applied for and obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to review said judgment. The Court of Appeals subsequently dismissed the writ of error upon the ground that the constitutional question was controlling and that it would not take jurisdiction of the case involving, as it did, such an issue. 104 Fed. Rep. p. 2.

Thereupon, the American Sugar Refining Company filed its petition in this court for a writ of *Certiorari;* or, in the alternative, for a writ of *Mandamus,* to the judges of the United States Circuit Court of Appeals of the Fifth Circuit, to compel them to entertain the writ of error heretofore dismissed by them.

Argument.

We will first address ourselves to a discussion of the prayer for a *mandamus.* We take it as an elementary proposition, needing no authorities or argument to support it, that a *mandamus* will not lie from an appellate court to an inferior tribunal to control judicial discretion, except when abused. There is no question of abuse in the instant case and the general proposition may

be stated accordingly that a superior court will not interfere by *mandamus* with the discretion of an inferior court. That proposition being once admitted, petitioner's prayer for a *mandamus* is without colorable support, for it is perfectly clear that under the Act of March 3rd, 1891, creating the Court of Appeals, and the interpretation repeatedly put upon that Act by this Court, it was entirely discretionary with the Circuit Court of Appeals for the Fifth Circuit whether it would take jurisdiction of the instant cause or not. It was a case in which it was distinctly alleged that a State's statute was in contravention of the Constitution of the United States. Therefore, it was essentially a case in which that court had the option of declining jurisdiction, if it so saw fit.

For it was expressly decided, in *Carter vs. Roberts,* 177 *U. S., p.* 500, that "when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this (Supreme) Court, and if such cases are carried to the Circuit Court of Appeals, those courts *may decline to take jurisdiction,* or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance."

This method of procedure was approved in terms in case of *R. R. Co. vs. Thiebaud, in* 177 *U. S.,* 615, which was a case where the statute of a State was claimed to be in contravention of the Constitution of the United States, as in the instant case. The three alternatives thus given the Court of Appeals were again recognized in the case of *Pike's Peak Power Co. vs. City of Colorado Springs, Fed. Rep., vol.* 105, *p.* 1, in which case the Court of Appeals for the Eighth Circuit chose to take jurisdiction and decided the whole case. As has been stated, the Circuit Court of Appeals for the Fifth Circuit in the present suit chose the first of the three alternatives permitted to them. It declined to take jurisdiction and dismissed the writ of eror. It is therefore clear that the court acted within the discretion granted it by the Act of March 3, 1891, and the interpretation put upon that Act by this

court, and we respectfully submit that to ask this court for a writ of *mandamus* to compel the Court of Appeals to hear a case which it had the discretion of declining to hear, would be a grave departure from all the purposes for which the writ of *mandamus* has ever been exercised by this court.

But petitioner urges that even though there be a constitutional question involved in the case, yet as the jurisdiction of the Circuit Court originally attached through diversity of citizenship of the parties, therefore the writ of error should have been sued out in the Circuit Court of Appeals and not in the Supreme Court. His contention is that where the constitutional question is only raised by way of defense, a writ of error or appeal, as the case may be, will not lie direct from the Circuit Court to the Supreme Court. But the fallacy of his position is conclusively shown by the decision in the case of *Louis Loeb, Plaintiff in Error, vs. the Trustees of Columbia Township, Hamilton County, Ohio, No.* 42, *October Term,* 1900, recently decided in this court. There, as in the case at bar, the jurisdiction of the Circuit Court arose from the diversity of citizenship. The defendant invoked the constitutional question by way of demurrer and not with the particularity invoked by the defendant's answer in this case. There was an appeal to the Supreme Court direct from the Circuit Court, which was met by a motion to dismiss, on the ground of want of jurisdiction. This court, through Justice Harlan, decided that, however the constitutional question arose, the fact that it was an issue in the case was sufficient to vest jurisdiction in the Supreme Court of the United States under section 5 of 26 Stat., 826 and 827, 8 (Act of March 3, 1891), which says that appeals or writs of error may be prosecuted to the Supreme Court *"in any case* in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The decision is instructive in another respect. The doctrine is there recognized also that if a party elects to invoke the jurisdiction of the Court of Appeals in spite of the existence of a constitutional question in the case, he must abide by its decision. In

other words, if that court decline jurisdiction, he cannot ask a superior tribunal to compel it to grant him a hearing, and likewise if the Court of Appeals take jurisdiction and render a final judgment upon the writ of error, he cannot thereafter invoke the jurisdiction of this court upon another writ of error to review the judgment of the Circuit Court.

When the writ of error in the instant case was sued out in the Circuit Court of Appeals, petitioner took the chances of having that court decline jurisdiction. That contingency having arisen, it cannot seek to compel the court to hear a case which it knew the court had an option of declining to entertain.

We do not conceive such to be the purpose of the writ of *mandamus,* and respectfully pray that petitioner be denied leave to file its application for same.

The prayer for *certiorari* is based on two grounds: First, it is urged that if the Circuit Court of Appeals were justified in dismissing petitioner's writ of error, yet "an unbroken line of authorities" cited in the brief justified the action of petitioner in suing out the writ of error at that time from the Court of Appeals, as the cases of *Carter vs. Roberts* and *R. R. Co. vs. Thiebaud* had not then been decided.

Petitioner implies that there has been a variation in the attitude of the Supreme Court of the United States on the subject, for which it should not be made to suffer. With due deference to the learned counsel, we submit that it is evident that he has misread the Statute of March 3, 1891, confused sections 5 and 6 thereof, and misapplied the interpretation of this Act contained in the decisions of this court, which he has quoted so elaborately in his brief. Section 5 of March 3, 1891, as said in the Loeb case, *supra,* gave the Supreme Court jurisdiction "*in any case* in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." The wording of the statute, in so far as this clause is concerned, has never been altered since the passage of the Act, and it is susceptible of no

doubtful meaning. No other inference can be drawn than that the Supreme Court is seized of jurisdiction in such cases.

The jurisprudence on the subject is as unmistakable in its meaning as is the statute, and not one of the decisions in "the unbroken line of authorities," to which petitioner refers in its brief, bears out its contention that under the jurisprudence as it existed up to the Carter case the Supreme Court would not have take cognizance of a writ of error in the instant case, involving, as it did, the constitutional question, unless that question appeared in plaintiff's statement of its own case in its original bill or declaration. This fact is made clear by examination of *Turck's case,* 150 *U. S., p.* 138 ; *Borgmeyer vs. Idler,* 159 *U. S.* 408 ;*Ex Parte Jones,* 164 *U. S.* 691 ;*Third St. Ry. Co. vs. Lewis,* 173 *U. S.* 460, which were leading cases relied upon by petitioner as having induced it to sue out the writ of error from the Circuit Court of Appeals instead of the Supreme Court. These cases are in nowise at variance with the Carter and Thiebaud cases, and indeed are perfectly consistent and reconcileable therewith, as shown in the Loeb case, cited above.

Petitioner's error seems to lie in its confusion of cases arising under Section 5 of the Act of March 3, 1891, and those arising under Section 6 of the same Act. It is perfectly true, as contended by it, that this court in cases above cited has repeatedly declared that in cases arising under Section 6, this court will not entertain appeals or writs of error from the Circuit Court of Appeals unless a constitutional question appear affirmatively in plaintiff's declaration. Such a procedure is in entire harmony with the provisions of Section 6, which is intended to apply to cases where the jurisdiction of the Circuit Court arises from the diverse citizenship of the parties, and in which the judgment of the Circuit Court of Appeals is final, but in no case has it ever been held by this court as a condition precedent to hearing an appeal or writ of error direct from the Circuit Court involving a constitutional question that this question had to appear in plaintiff's petition. Such a case is covered by Section 5, and the rules

laid down by this court in Turck's case and others, which arose under Section 6, have no application in fixing the appellate jurisdiction of this court.

As was said in the Loeb case, a very great difference exists between cases in which the appeal is from the Circuit Court to the Supreme Court direct, and those in which a final judgment has been rendered in the Circuit Court of Appeals before the jurisdiction of the Supreme Court is invoked. For instance, suppose the Court of Appeals had taken jurisdiction and decided the present case, and either party had sued out a writ of error from the Supreme Court to the Court of Appeals, then would a similar case to Turck's case have been presented. Petitioner, or the city, might then urge with conclusive force the objection that the jurisdiction of the Circuit Court arose solely from the citizenship of the parties, the constitutional question did not appear in plaintiff's petition, and under the 6th section the decision of the Court of Appeals was final. This court would then hold that, as the Court of Appeals had heard and decided the whole case, and none of the unusual features justifying the review by writ of error in cases arising under Section 6 were presented, the writ should be denied. But this suit is governed by the provisions of Section 5, and none of these decisions from Turck down to Ex Parte Jones referred even remotely to appeals or writs of error sued out under that section. Under Section 5 the Supreme Court is vested with direct appellate jurisdiction "in any case that involves the construction or application of the Constitution of the United States, or in any case in which the Constitution or law of the State is claimed to be in contravention with the Constitution of the United States." And indeed no more conspicuous example of a case arising under Section 5 could arise than the present one If petitioner in the face of this unequivocal declaration mistook the forum in which to seek relief and was unable to differentiate this case from a case like Turck's case, arising under Section 6, it cannot expect the writ of *certiorari* to come to its rescue in its extremity.

The other ground urged in support of the application for the writ of *certiorari* is that this cause involves "other and grave questions of law" in addition to the constitutional question.

"The other and grave questions" are whether a refiner of sugar is a "manufacturer" and as such exempt from license under the Constitution of Louisiana, Article 229 of 1898, and whether a Federal court will follow the decision of the highest court of Louisiana on that subject. We will not go into the discussion of the merits of the first proposition. The Supreme Court of Louisiana, in the suit of *State of Louisiana vs. American Sugar Refining Company,* the petitioner here, reported *in* 51*st La. Annual, p.* 562, in an elaborate and well considered opinion, held petitioner to be a *refiner,* and not a manufacturer of sugar, and as such liable to a license tax. That suit was brought under Act 150 of the Legislature for the year 1890, which is similar in its provisions to the city Ordinance 14,884, C. S., Sec. 15, under which the said license is sought to be enforced in the present suit. The exemption claimed by petitioner in suit against the State was claimed under Article 206 of the Constitution of Louisiana, 1879, which is identical in all respects with Article 229 of the Constitution of 1898, under which exemption is claimed in this case. Therefore, this suit involves the identical issues considered and decided in the case of the *State vs. American Sugar Refining Company.* The two suits are similar in all respects, and we are quite content to rest our views as to whether a sugar refiner is a manufacturer or not on the comprehensive and well reasoned opinion of the Supreme Court of Louisiana in that case. We therefore submit that the decision of the Circuit Court of the United States in this case is in accord with the decision of the Supreme Court of Louisiana in a similar case, and even if a writ of *certiorari* were to be granted, the decision of the Circuit Court would be affirmed by this court on consideration of the merits of the controversy.

But granting that the judgment of the Supreme Court of Louisiana, in question, did not meet with the approval of this

court, we respectfully submit that it would yet be binding upon it. As an expression of the highest court of a State in the matter of the construction of the organic law of the State, it would receive, under the well settled principle adopted by this court, the sanction of the Supreme Court of the United States. There was, as your Honors will recall, a writ of error sued out in this court to the Supreme Court of Louisiana in the case of *State of Louisiana vs. American Sugar Refining Company,* above referred to, and the question whether a refiner of sugar was a manufacturer became an issue there as here. Judge Brown, in denying the writ, used the following language: "It is scarcely necessary to say that the question whether the defendant were a manufacturer within the meaning of the Louisiana Constitution is one dependent upon the construction of that Constitution and that the interpretation given to it by the State Supreme Court, raising as it does no question of contract, is obligatory upon this court."

"American Sugar Refining Company, Plaintiff in Error, vs. The State of Louisiana *et al.*" on writ of error to the Supreme Court of Louisiana, No. 38, October term, 1900. Should, therefore, your Honors grant the writ of *certiorari,* it would in no way operate to the advantage of petitioner, but would prove a vain and idle ceremony. This court has already said it would follow the decision of the Supreme Court of Louisiana in the premises, and the Supreme Court of Louisiana has decided adversely to the contention of petitioner.

We, therefore, respectfully submit that there is nothing in the instant case to make necessary or proper the exercise of the discretionary power lodged in this court to grant writs of *certiorari.*

SAMUEL L. GILMORE,

City Attorney for City of New Orleans.

3498

Office Supreme Court U. S.
FILED
JAN 14 1901
JAMES H. McKENNEY,
Clerk.

No. 535

In the Supreme Court of the United States.

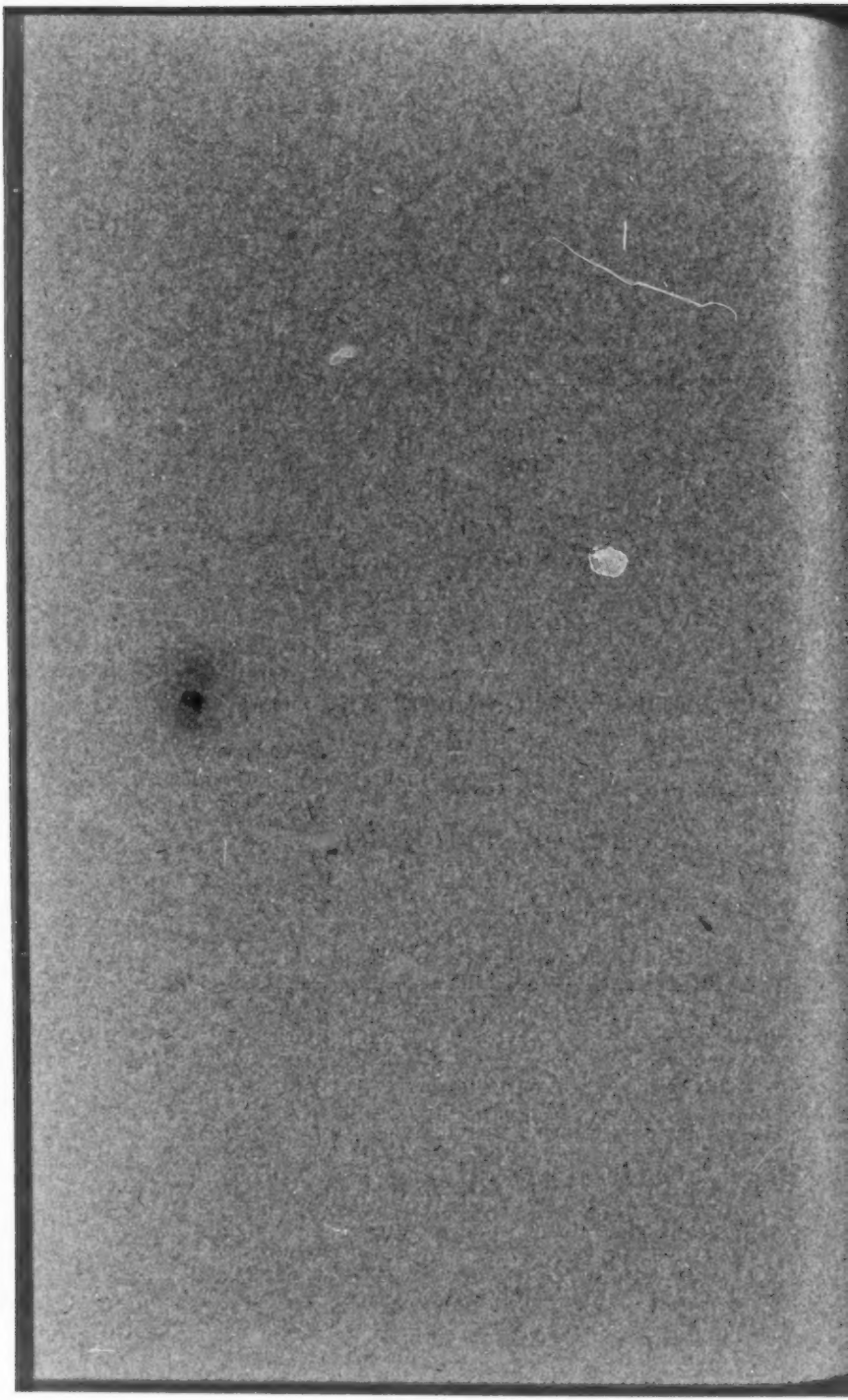
THE AMERICAN SUGAR REFINING COMPANY,

Petitioner.

versus

CITY OF NEW ORLEANS,

Respondent.



34984

INDEX.

	PAGE
Caption	A
Transcript of Proceedings in Civil District Court, Parish of Orleans:	
Rule on American Sugar Refining Company	1
Sheriff's Return on Rule	2
Petition for Removal of Cause	3
Affidavit on Petition	4
Bond for Removal	4
Order for Removal	5
Clerk's Certificate to Transcript	5
Proceedings in U. S. Circuit Court, Eastern District of Louisiana:	
Rule to Reform Pleadings	7
Hearing and Submission of Rule to Reform Pleadings	8
Order—Cause to proceed as a case at law upon Plaintiff withdrawing application for injunction, etc	8
Petition of City of New Orleans	9
Answer of Defendant	10
Case called, jury empaneled, hearing of evidence, etc., in part, and continuance	12
Exception of no cause of action	13
Case resumed, hearing further arguments and continuance	13
Continuances	14
Case resumed, further hearing and Verdict	14
Judgment	15
Defendant's Bill of Exceptions (with testimony made a part thereof)	16
Stenographic Report of Testimony and Proceedings had upon the trial of the cause:	
Testimony of John McFetridge, for Defendant	18
Testimony of J. T. Witherspoon, for Defendant	29
Testimony of John McFetridge, re-called for Defendant	30

INDEX—Continued.

PAGE.

Motion to direct Verdict for Plaintiff 30
Motion to direct Verdict for Defendant 30
Note as to Offering by Defendant in connection with Testimony of John McFetridge, of Samples of Ingredients, being Exhibits numbered from 1 to 23, inclusive; Photographs numbered from 24 to 27, inclusive; 29 to 35, inclusive; 36, 36a, and 37; Blue Print No. 28; also Filter Bag No. 38 31
Ordinance No. 14,884, Council Series of the City of New Orleans, offered by Plaintiff, and Note in reference thereto: 31
Stipulation of Parties as to Transcript 36
Defendant's Petition for Writ of Error and Order thereon.. 37
Assignment of Errors 38
Bond for Writ of Error 40
Writ of Error 41
Citation in Error 42
Proof of Service of Citation in Error 42
Clerk's Certificate 43
Proceedings in U. S. Circuit Court of Appeals, Fifth Circuit:
Argument and submission 44
Judgment of Dismissal 44
Petition for Rehearing 45
Order denying Petition for Rehearing 48
Opinion of the Court 48
Dissenting Opinion per McCormick, J 50
Certificate of Clerk 52

A.

CAPTION.

United States of America, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Judicial Circuit begun on the third Monday of November, 1899, and held in the Court room of said Court in the City of New Orleans.

Before the Hon. Don A. Pardee, the Honorable A. P. McCormick and the Honorable David D. Shelby, United States Circuit Judges for the Fifth Judicial Circuit.

The American Sugar Refining Co.
Plaintiff in Error.

versus

The City of New Orleans,
Defendant in Error.

Be it remembered that heretofore, to-wit, on the 2nd day of March, 1900, a transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, was filed in the office of the Clerk of said United States Circuit Court of Appeals, for the Fifth Circuit, in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

THE CITY OF NEW ORLEANS

versus No. 12,827.

THE AMERICAN SUGAR REFINING COMPANY.

TRANSCRIPT OF PROCEEDINGS IN CIVIL DISTRICT COURT, PARISH OF ORLEANS.

Filed October 25, 1899.

Civil District Court.

City of New Orleans
vs. No. .....
American Sugar Refinery Co.

On motion, Geo. B. Penrose, Treasurer of the City of New Orleans, by C. H. Lavillebeuvre, Assistant City Attorney, and on suggesting to the Court that the American Sugar Refinery Co. is conducting the business of refining sugar and molasses on the levee front and in said city, without having obtained a license for said business from the City of New Orleans, for the year 1899; and that their gross annual receipts in said business for the past year were and for the present year will be more than two million five hundred thousand dollars, and on further suggesting that all persons who conduct any business without a license from the City of New Orleans after the first day of

March, 1899, are delinquent; and on further suggesting to the Court that the said American Sugar Refining Company has not paid to said city the amount of license due by them for carrying on said business for the year 1899, and that under the terms of section 15 of ordinance No. 14,884, Council Series, of said city, there is due and owing to said city by said American Sugar Refining Company the sum of six thousand two hundred and fifty dollars for a license for carrying on their said
2 business for the year 1899. That the City of New Orleans has a first lien and privilege on the property of defendant for the security of the payment of the license herein claimed.

It is ordered by the Court that the American Sugar Refining Company, through its proper officers, do appear and show cause on the fifth day, excluding Sundays and legal holidays, after service hereof, at 11 A. M., why they should not pay the sum of six thousand two hundred and fifty dollars to the City of New Orleans for a license for the privilege of conducting the above mentioned business during the year 1899, with 2 per cent. per month interest from March 1st, 1899, until paid, and cost of this proceeding, or be restrained from the carrying on of said business until said license, penalties, fees thereon and costs of Court be paid.

And that the said American Sugar Refining Company, through its proper officer, be required to show further why this rule should not be made absolute, and judgment rendered in favor of the City of New Orleans, for six thousand two hundred and fifty dollars, with penalties and costs of Court, with first lien and privilege on the property of the defendant and the injunction be perpetuated.

(Indorsed:) Div. E. No. 59602. Civil District Court. City of New Orleans vs. American Sugar Refining Company. Filed June 15th, 1899. Signed Louis Burthe, Dy. Clerk. Filed June 9th, 1899, and entered on minutes June 12th, 1899. Signed Paul O. Guerin, Clerk.

Received Monday, June 12th, 1899, and on the 13th day of June, 1899, served a copy of the within rule on the American Sugar Refining Company, defendant herein, by personal service of J. T. Witherspoon, its manager.

Sheriff's fees, 50c. Returned same day.

(Signed) CHS. MOREL, Dy. Shff.

PETITION.

3 Filed June 14th, 1899.

Civil District Court, Division "E."

City of New Orleans
vs. No. 59602.
American Sugar Ref. Co.

To the Honorable, the Civil District Court in and for the Parish of Orleans:

The petition of the American Sugar Refining Company, with respect shows:

That your petitioner is a corporation created under the laws of the State of New Jersey and is a citizen of the said state and that the City of New Orleans is a municipal corporation created under the laws of the State of Louisiana, and is a citizen of the said state, domiciled in the Parish of Orleans in said state, and that the matter or amount in dispute in the above entitled suit exceeds, excluding costs, the sum or value of five thousand dollars.

That the controversy in said suit is between citizens of different states and that the defendant, the said American Sugar Refining Company, at the time of the commencement of this suit, was and still is a citizen of the State of New Jersey, and that the plaintiff, the City of New Orleans, was then and still is a citizen of the State of Louisiana.

And your petitioner now offers and files herewith a good and solvent surety, for its entering in the Circuit Court of the United States for the Eastern District of Louisiana, sitting at New Orleans, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court hold that this suit was wrongfully or improperly removed thereto.

Petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed to the said Circuit Court of the United States for the Eastern District of Louisiana, and it will ever pray.

4 THE AMERICAN SUGAR REFINING CO.,
By Its Manager,
(Signed) J. T. WITHERSPOON,
(Signed) THOS. J. SEMMES,
Atty. for Petitioner.

AFFIDAVIT.

Jackson T. Witherspoon, being sworn, deposes and says that he is the manager of the American Sugar Refining Company, the above named petitioner, and authorized by it to file said petition and to stand in judgment for said American Sugar Refining Co., in Louisiana and that all the facts and allegations of the foregoing petition are true and correct.

(Signed) J. T. WITHERSPOON.

Sworn to and subscribed before me, this 14th day of June, 1899. (Signed) EDWARD RIGHTOR,

[Seal] Notary Public.

BOND FOR REMOVAL.

Filed June 14th, 1899.

Civil District Court, Division "E."

City of New Orleans
vs. No. 59602.
American Sugar Ref. Co.

Know all men by these presents, That the American Sugar Refining Company, as principal, and Jackson T. Witherspoon of the City of New Orleans as surety, are held and firmly bound unto The City of New Orleans, in the penal sum of five hundred dollars, the payment whereof well and truly to be made, unto the said City of New Orleans, their successors, representatives and assigns, we bind ourselves, our successors, representatives heirs and assigns jointly and severally by these presents.

The condition of this obligation is such that if said
5 American Sugar Refining Company, having petitioned the Civil District Court for the Parish of Orleans, State of Louisiana, for the removal of a certain cause therein pending, No. 59602, of the docket of said Court, wherein the said American Sugar Refining Company is defendant and The City of New Orleans is plaintiff, to the Circuit Court of the United States in and for the Eastern District of Louisiana.

Now, if the said American Sugar Refining Company shall enter in the U. S. Circuit Court on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said U. S. Circuit Court if said Court shall hold that said suit was improperly removed

thereto, then this obligation to be void, otherwise in full force and effect.

Witness our hands and seals this 14th day of June, 1899.

THE AMERICAN SUGAR REFG. CO.,
By J. T. WITHERSPOON, Manager, [Seal]
(Signed) J. T. WITHERSPOON, [Seal]

AFFIDAVIT.

Jackson T. Witherspoon, being duly sworn, says: I am the surety on the foregoing bond. I reside in the City of New Orleans and I am worth over the sum of two thousand dollars above all property exempt from sale or execution.

(Signed) J. T. WITHERSPOON.

Sworn and subscribed to before me on this 14th day of June, 1899. (Signed) EDWARD RIGHTOR,
Notary Public. [Seal]

ORDER FOR REMOVAL.

Civil District Court, Division "E."

City of New Orleans
vs. No. 59602.
American Sugar Ref. Co.

6 Considering the petition, affidavit and bond filed by the defendant, The American Sugar Refining Co., it is ordered that this cause be removed to the United States Circuit Court for the Eastern District of Louisiana, sitting in New Orleans at the next term of said Court, and that a transcript of the proceedings in this cause be filed in said Court at said next term, to-wit: the first Monday of November, 1899.

New Orleans, June 14th, 1899.

(Signed) GEO. H. THEARD, Judge.

State of Louisiana,

Civil District Court for the Parish of Orleans.

I, Jas. C. Peyton, Deputy Clerk of the Civil District Court for the Parish of Orleans, do hereby certify that the foregoing five (5) pages do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause wherein City of New Orleans is plaintiff, and American Sugar Refinery Co. is defendant, instituted in this Court and now in the records thereof under the No. 59602 of the docket of this Honorable Court Division "E," Honorable Geo. H. Theard, Judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said Court, at the City of New Orleans, on this 16th day of June, in the year of our Lord, one thousand eight hundred and ninety-nine and in the one hundred and twenty-third year of the Independence of the United States of America.

[Seal] (Signed) JAS. C. PEYTON, Deputy Clerk.

PROCEEDINGS IN THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA.

7

RULE TO REFORM PLEADINGS.

Filed November 13, 1899.

United States Circuit Court, Eastern District of Louisiana.

The City of New Orleans
vs. No. 12,827.
The American Sugar Refining Co.

Upon motion of Carroll & Carroll, attorneys for The American Sugar Refining Company, defendant herein, and upon their suggestion that the cause of action herein belongs to and should be considered upon the equity side of this Honorable Court, and that the relief sought to be obtained can be administered only by a Court of Chancery; and

Upon further suggestion that plaintiff's original pleading by way of rule is informal and insufficient under the rules and practice of this Honorable Court, as a statement of a cause in equity and that defendant should not be compelled to plead, answer or demur thereto until the same shall have been reformed and conformed to the rules and practice of this Honorable Court and to general equity practice; and

Upon further suggestion that plaintiff should be ordered to amend and reform its pleadings as hereinabove set forth,

It is ordered that the City of New Orleans, plaintiff herein, do show cause at eleven o'clock A. M., of Saturday, November 18th, 1899, why it shall not be ordered to reform and amend its original pleading herein so as to conform to the equity rules and practice of this Court; and

It is further ordered that until the final disposition of this rule, defendant be dispensed from answering or otherwise pleading to the rule herein filed by plaintiff.

Service accepted. (Signed) C. H. LAVILLEBEUVRE,
W. B. SOMMERVILLE,
Assts. City Atty.

N. O., Nov. 8, '99.

8 November 18th, 1899. Rule to reform pleadings continued by agreement of counsel to November 25th, 1899.

HEARING AND SUBMISSION OF RULE TO REFORM PLEADINGS.

Extract from Minutes, November Term, 1899.

New Orleans, Saturday, December 2, 1899

Court met pursuant to adjournment.

Present, Hon. Charles Parlange, District Judge.

City of New Orleans
vs. No. 12827.
American Sugar Ref. Co.

This cause came on to be heard upon the rule to reform pleadings taken by defendant.

Carroll & Carroll appearing for mover,

C. H. Lavillebeuvre, Asst. City Atty., for City of New Orleans.

And was argued by counsel and submitted, when the Court took time to consider.

ORDER—CAUSE TO PROCEED AS A CASE AT LAW UPON PLAINTIFF WITHDRAWING APPLICATION FOR INJUNCTION, ETC.

Extract from Minutes, November Term, 1899.

New Orleans, Tuesday, December 19, 1899.

Court met pursuant to adjournment.

Present, Hon. Charles Parlange, District Judge.

City of New Orleans
vs. No. 12827.
American Sugar Ref. Co.

The motion to reform pleadings having been heard and submitted and the Court having considered the same, and counsel for the City of New Orleans having stated to the Court orally, at the hearing of the motion, that said City of New
9 Orleans desired to withdraw in this cause, its application for an injunction and claim for lien and desired to stand only in this cause upon its moneyed demand.

It is ordered that upon the said City of New Orleans withdrawing its application for injunction and claim for lien, the rule herein be discharged and that this cause for the moneyed demand proceed according to the practice in cases at law.

PETITION OF CITY OF NEW ORLEANS.

Filed December 28, 1899.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12827.
American Sugar Ref. Co.

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Louisiana:

The petition of the City of New Orleans, a corporation under the laws of the State of Louisiana, through George B. Penrose, treasurer thereof, respectfully represents:

That the American Sugar Refining Company, a corporation doing business in this city, is indebted unto petitioner in the sum of six thousand two hundred and fifty ($6250.00-100) dollars, with 2 per cent. per month interest from March 1st, 1899, until paid, and costs of proceedings, for this, to-wit:

That the said American Sugar Refining Company have been, during the year 1899, and are now, conducting in this city, on the Levee front, and at North Peters street, the business of refining sugar and molasses, without having paid to petitioner the license required by law for carrying on said business; that by virtue of and by the terms of Ordinance 14884, C. S., of the City of New Orleans, and especially Section 15 of said Ordinance, when the gross annual receipts for the business of refining sugar and molasses equals or exceeds the sum of two million five hundred thousand dollars, the license due the city for the carrying on of said business shall be the sum of six thousand two hundred and fifty dollars ($6250.00).

That the gross annual receipts of the American Sugar Refining Co. in their said business for the past year, and for the present year is more than two million five hundred thousand dollars; and that the sum of six thousand two hundred and fifty dollars is accordingly due to petitioner.

Wherefore, the premises considered, petitioner prays that the American Sugar Refining Company be cited through its proper officers to appear and answer this petition and after proceedings had, there be judgment in favor of petitioner, the City of New Orleans, and against the said American Sugar Refining Company, condemning them to pay unto petitioner the sum of six thousand two hundred and fifty ($6250.00) dollars for license for carrying on the business of refining sugar and molasses dur-

ing the year 1899, with (2%) two per cent. per month interest from March 1st, 1899, until paid, and costs; and petitioner prays for such further relief as law, or the nature of the case may require. (Signed) C. H. LaVILLEBEUVRE,
Assistant City Attorney,
(Signed) SAM'L L. GILMORE,
City Atty.

ANSWER OF DEFENDANT.

Filed December 29, 1899.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12827.
American Sugar Ref. Co.

Now, by its undersigned attorneys, comes the defendant, The American Sugar Refining Company, a corporation organized under the laws of the State of New Jersey, without waiving, but specially reserving its objection and exception
11 to the judgment and order of this Honorable Court, ordering that this cause be proceeded with on the law side of this Court, and for answer to plaintiff's petition, denies each and every allegation thereof save in so far as hereinafter specially admitted.

Further answering, defendant avers that it is now, and has been during the year 1899, engaged in the business of refining its own sugar in the Second District of the City of New Orleans; admits that its gross annual receipts for the year 1898 were, and for the year 1899 will be, more than two million five hundred thousand dollars; and admits that it has not taken out a license from the City of New Orleans for the year 1899.

Further answering, defendant denies that it is indebted to plaintiff in any sum for license tax as claimed, and avers that its business of refining sugar is exempt from the payment of any license tax to the City of New Orleans because its said business is and always has been solely that of refining its own sugar, and none other, and as such it is, and has been throughout the year 1899 and prior thereto, one of those manufacturers enumerated in Article 229 of the Constitution of the State of Louisiana, adopted May 12th, 1898, as entitled to exemption from license tax; and defendant avers furthermore that its said business is and has always been conducted by means of mechanical devices appliances and apparatus, and it is for

that reason further exempted by said Article 229 of the Constitution from payment of license tax as being a person engaged in a mechanical pursuit; that in so far as the Ordinance No. 14,884, Council Series, purports or attempts to levy a license tax upon defendant and defendant's said occupation of sugar refining, the same is in conflict with said Article 229 of the Constitution of Louisiana, and is null and void; and defendant specially pleads its said exemptions as being a manufacturer and a person engaged in a mechanical pursuit, or either
12 of them.

Further answering, defendant avers and says that the Ordinance No. 14,884, Council Series, of the City of New Orleans, under which plaintiff claims, violates the Constitution of the United States and the amendments thereof and is void in so far as it attempts to impose a license tax upon defendant, approved July 14th, 1898, has attempted to impose a State license tax upon refiners of sugar and molasses, or either of them; that said Act No. 171 of 1898, conflicts with the Constitution of the United States and the amendments thereto and is void in so far as it attempts to impose a license tax upon this defendant and others in like situation because said Act No. 171 of 1898 denies to this defendant the equal protection of the laws of the state, inasmuch as said act does not impose equally a license tax on all persons engaged in the business of refining sugar and molasses, but discriminates in favor of planters who refine their own sugar and molasses and in favor of planters who granulate syrup for other planters during the rolling season, and therefore said act conflicts with and is repugnant to the Constitution of the United States and the amendments thereto, particularly the First Section of the Fourteenth Amendment, which prohibits any state from depriving a person of his property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws;

That said Article 229 of the Louisiana Constitution of 1898 forbids any political corporation to impose a greater license tax than is imposed by the state, and that said Ordinance No. 14,884, Council Series, cannot be and is not in law broader or more comprehensive than said Act No. 171 of 1898, and violates said Article 229 of the Constitution, and violates and is repugnant to the Constitution of the United States and the amendments thereto, particularly the First Section of the Fourteenth Amendment, and is void in so far as it attempts to impose a
13 license tax upon this defendant for conducting its said business of sugar refining.

And defendant further avers and shows that said Ordinance No. 14,884, Council Series, and said Act No. 171 of 1898, vio-

late and are repugnant to Article 225 of the Constitution of the State of Louisiana which provides that taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, in that said Act. No. 171 of 1898, and said Ordinance No. 14,884, Council Series, attempt to impose a tax upon this defendant which is not equal and uniform as hereinabove set forth, and which discriminate in favor of planters who refine their own sugar and molasses and planters who granulate syrup for other planters during the rolling season.

Wherefore, the premises considered, defendant prays that plaintiff's suit be dismissed and rejected and that it be hence dismissed with its costs in this behalf expended.

(Signed) CARROLL & CARROLL,
Attorneys for the American Sugar Refining Company
Defendant.

January 9, 1900.—Cause Continued to Jany. 16, 1900 by Agreement of Counsel.

Case called, jury empaneled, hearing of evidence, etc., in part, and continuance.

Extract from the Minutes, November Term, 1899.

New Orleans Tuesday, January 16, 1900.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

City of New Orleans
vs. No. 12,827.
American Sugar Refining Co.

14 This cause was this day called for trial.

Chas H. Lavillebeuvre, Assistant City Attorney, appearing for the plaintiff;

Carroll & Carroll, for the defendant.

Whereupon the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. J. Percy Glenn,
2. W. B. McCutchon,
3. J. P. Hecker,
4. E. S. Ferguson,
5. Fred B. Nunn,
6. H. P. Cheval,
7. A. H. Flaspoller,
8. W. L. Jewell,
9. A. J. Libano,
10. Fred Folger,
11. Emile Forster,
12. H. B. Berthelot.

when the Court appointed J. Percy Glenn foreman of the jury and the trial was proceeded with.

The pleadings were read and evidence and testimony heard and offered before the Court and jury. Whereupon, counsel for defendant filed an exception of no cause of action and moved that the Court direct a verdict for said defendant. Counsel for the plaintiff, the City of New Orleans, moved the Court to direct the jury to find a verdict for said plaintiff.

After hearing arguments from the counsel for the respective parties, it was ordered that the cause be continued until tomorrow at 11 A. M.

EXCEPTION OF NO CAUSE OF ACTION.

Filed January 16, 1900.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12,827.
The American Sugar Refining Co.

Now by its undersigned attorneys comes the defendant and excepts to plaintiff's petition and for cause of exception says that said petition shows no cause or right of action as against defendant.

15 Wherefore, defendant prays that this exception be upheld and maintained and plaintiff's suit be dismissed at her cost. (Signed) CARROLL & CARROLL,
Attorneys for the American Sugar Refining Co., Defendant.

CASE RESUMED, HEARING FURTHER ARGUMENTS AND CONTINUANCE.

Extract from the Minutes, November Term, 1899.
New Orleans, Wednesday, January 17, 1900.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.

City of New Orleans
vs. No. 12,615.
American Sugar Refining Co.

This cause as continued from yesterday was this day resumed

and the counsel for the respective parties as well as the jurors empaneled in the cause being all present the trial was proceeded with.

After hearing further arguments from counsel it was ordered that the cause be continued until Saturday, Jan. 20, 1900, at 11 A. M.

January 20, 1900.—Case continued to Wednesday, January, 24, 1900, owing to illness of Atty. for Plaintiff.

January 24th, 1900.—Case continued to Monday, January 29, 1900, for further hearing, on motion of Atty. for plaintiff.

CASE RESUMED, FURTHER HEARING AND VERDICT.

Extract from the Minutes, November Term, 1899.

Monday, January 29, 1900.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

16 City of New Orleans

vs. No. 12,615.

American Sugar Refining Co.

This cause as continued from a former day was this day resumed, and the counsel for the respective parties as well as the jurors empaneled in the cause being all present, the trial was proceeded with.

After hearing further arguments from counsel for plaintiff, the Court overruled the exception of no cause of action and granted the motion of the plaintiff to direct the jury to find a verdict for the said plaintiff, and refused the defendant's motion to direct a verdict for said defendant; whereupon counsel for defendant reserved a bill of exceptions to the ruling of the Court.

Thereupon after hearing the charge of the Court, the said jury did then and there in open Court, under instructions from the Court, through their foreman, render and deliver the following verdict, viz:

We, the jury, find a verdict in favor of the plaintiff, the City of New Orleans and against the defendant the American Sugar Refining Company for the sum of six thousand two

hundred and fifty dollars ($6,250) with two per cent month interest from March 1st, 1899, until paid.

J. PERCY GLENN, Foreman.

January 29, 1900.

And thereupon it was ordered that the said verdict be recorded and it is done accordingly.

JUDGMENT—EXTRACT FROM THE JUDGMENT BOOK.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

District of Louisiana, New Orleans Division.

17 November Term, 1899.

New Orleans, Monday, January 29, 1900.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

City of New Orleans
vs. No. 12,827.
American Sugar Refining Co.

By reason of the verdict of the jury herein and in accordance therewith:

It is ordered, adjudged and decreed that the plaintiff, the City of New Orleans do have and recover of and from the defendant the American Sugar Refining Company the sum of six thousand two hundred and fifty dollars ($6,250.00) with (2%) two per cent per month interest from March 1st, 1899, until paid and all costs of suit.

Judgment rendered January 29, 1900.

Judgment signed February 10, 1900.

(Signed) CHARLES PARLANGE, Judge.

DEFENDANT'S BILL OF EXCEPTIONS (WITH TESTIMONY MADE A PART THEREOF.)

Filed February 10, 1900.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12,827.
The American Sugar Refining Co.
Bill of Exceptions.

Be it remembered that on the sixteenth day of January, 1900, the above entitled cause came on for trial before the above Court and a jury duly empaneled, Hon. Charles Parlange, presiding.

Plaintiff appeared by Mr. C. H. Lavillebeuvre, Assistant City Attorney, and the defendant appeared by Messrs. Carroll & Carroll, its attorneys. Whereupon the testimony in
18 the case was taken and evidence offered, for both parties, as set forth at length in the fourteen annexed typewritten pages, duly reported by the Court stenographer.

Counsel for defendant having moved the Court to instruct a verdict for defendant, and plaintiff's counsel having asked the same instruction in plaintiff's favor, argument was thereupon had in the cause, which argument was continued until January 17th, upon which day a further continuance was had until January 20th, upon which day a further continuance was had until January 24th, upon which day a further continuance was had until January 29th, upon which day argument was concluded by counsel for the plaintiff. Thereupon counsel for defendant, in the presence of the jury moved the Court (1) to instruct the jury to bring in a verdict for defendant and also requested the Court to give instructions as follows, to-wit:

(2) "The Court charges the jury that defendant is a manufacturer and is exempt from license taxation under the Constitution of Louisiana, and that the jury shall bring in a verdict for the defendant."

(3) "The Court charges the jury that the ordinance of the City of New Orleans, imposing a tax upon sugar refiners is in conflict with the Fourteenth Amendment to the Constitution of the United States and is, as to defendant, null and void, and that the jury shall bring in a verdict for defendant."

Counsel for plaintiff also moved the Court to instruct the jury to bring in a verdict for plaintiff. Whereupon the Court after orally stating its reasons, overruled the exception of no cause of action herein filed by defendant, and refused to give each

and every one of the instructions asked by defendant and gave the jury the general charge in favor of the plaintiff;
19 to each and every one of which rulings counsel for defendant then and there severally excepted in open Court, (and does still except) and moved the Court for leave to make part of each and every one of its exceptions and of the bill of exceptions thereon, all of the testimony taken in the case, together with the offers of evidence, consisting of the City Ordinance No. 14,884 and the materials and photographs set forth, described and referred to in the stenographer's notes of testimony, all of which were allowed by the Court.

The jury thereupon brought in a verdict, through its foreman for plaintiff for the amount claimed in the suit, to-wit: six thousand two hundred and fifty dollars, with interest at the rate of two per cent per month from March 1st, 1899, until paid, and judgment was at once entered thereon and signed on February, 1900.

And the defendant prays that this, its bill of exceptions, may be allowed, settled and sealed.

(Signed) CARROLL & CARROLL,
Attorneys for Defendant.

Plaintiff approves the foregoing bill of exceptions as correct.

(Signed) C. H. LAVILLEBEUVRE,
Attorney for Plaintiff.

The foregoing bill of exceptions with the fourteen typewritten pages of testimony thereto attached is correct in all respects; and the said bill of exceptions is hereby approved, allowed and settled and made part of the record herein, including therewith the fourteen typewritten pages of testimony and the offers in evidence therein referred to, all of which are hereby
20 made part of the record herein, and are certified to contain and constitute all of the evidence in the cause.

Dated this 10th day of February, 1900, and done in open Court. (Signed) CHARLES PARLANGE, Judge.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12,827.
The American Sugar Refining Company.

New Orleans, La., January 16th, 1900.

The Court met this day pursuant to adjournment.

Present: His Hon. Charles Parlange, Judge, with a jury.

Present: C. H. LaVillebeuvre, Esq., for the plaintiff.

Carroll & Carroll, Esqrs., for the defendant.

The pleadings having been read to the jury, Mr. Lavillebeuvre for the plaintiff states, that the suit is brought under Ordinance 14,884, C. S., especially Section 15, by which it is enacted, that persons carrying on the business of sugar refining, whose gross income exceeds $2,500.00 shall pay a license of $6,250.

Whereupon Messrs. Carroll & Carroll for the defendant admit that the defendant is engaged in the business of sugar refining, and its gross annual income amounts to more than $2,500,000.

Mr. LaVillebeuvre: It having been admitted by counsel for the defendant, that the defendant is carrying on the business of sugar refining, and that its gross annual receipts are
21 over $2,500,000, I have no evidence to offer, except the ordinance of the City Council, No. 14,884, particularly section 15, upon which this suit is based.

And the plaintiff rests its case.

JOHN McFETRIDGE, sworn for the defendant, says:

By Mr. Carroll:

Q. What is your position with the defendant company?

A. I am superintendent of the refinery here.

Q. What experience have you had in the refining of sugar?

A. I have been refining sugar, directly in charge of a refinery, or indirectly as assistant in charge, for 14 or 15 years.

Q. Are you familiar with the processes used by the defendant, in the refining of sugars in its establishment in this city?

A. Yes, sir.

Q. Are you familiar with the processes in general use throughout the country and throughout the world?

A. Yes, sir.

Q. Are the processes substantially the same in one case as in the others?

A. In the refineries, yes, sir.

Q. In the refining of sugar?

A. Yes, sir.

Q. Will you please state to the Judge and jury, what the process of refining sugar consists of, taking it at the beginning with your samples there, and showing the different ingredients used in the product?

A. I can illustrate it better perhaps by the samples. We

have here a series of exhibits, marked from "1" to "11" in bottles, that is the raw product in the form in which we receive it in the refineries. There are a numbr of grades of Louisiana sugar, from the higher grades, No. 1, 2 and some lower, No. 3 and 4, raw sugar, and No. 5, also Louisiana Sugar of a low grade, that we buy and refine. No. 6 is the kettle sugar of Louisiana, and No. 7 is also a kettle sugar. No. 8
22 is malado sugar, or the cistern bottom of Louisiana sugar. No. 10 is Cuban or foreign sugar, while No. 11 is beet sugar. These are the various grades of raw sugar that we receive at refineries, and put through our processes. We have subdivided the exhibits in this way for convenience.

Q. State what colors these sugars have, so they can go down in the record. Are they white, brown, or what color?

A. The higher grades of Louisiana sugar are of a light brownish color, while the lower grades of Louisiana sugar of a much darker brown and Cuban sugars are quite a dark brown as is beet sugar.

Q. Do you use all these sugars from "1" to "11" in your refining operations?

A. Yes, sir; we have used them all during the past year. We have melted all the grades shown there.

Q. Is the process of refining the same in each case, of each grade of sugar?

A. Practically the same.

Q. State what is done with these raw sugars after you receive them?

A. All raw sugar that is received at all refineries, is taken from the original packages in which it was delivered at the refineries and melted, dissolved in melters, which are cylindrical iron vessels, with perforated steam coils, and appliances for melting sugar. This process of melting is necessary, for the further progress of work, throughout the various grades of refining. We have some exhibits in the nature of photographs here showing the process.

Q. Which show what?

A. Showing some of these appliances that I will speak of as we go along. This exhibit No. 24, is a photograph of our melters, for melting or dissolving the sugar.

Q. Is that a true photograph of the melters that you have in your establishment?

A. Yes, sir: it is a correct photograph and was made in the establishment.

23 Q. What is the object of the melting?

A. The object of the melting is to dissolve the grain and put the sugar in a liquid condition, for the subsequent

process of filtration, recleansing and recrystalizing, which come in later in the process.

Q. After the melting, what is done with the liquid product?

A. All the liquid product which comes from the melters—these melters shown in the photograph, is put into blow-ups, which are on one of the upper stories of the upper building, where the clarification process commences, and the density and temperature and other necessary adjustments of the liquid is made for the process of filtration which follows. This is a correct photograph of the blow-up. (No. 25.)

Q. Are these photographs that you use as exhibits, true photographs?

A. Yes, sir; they were all taken under my personal direction.

Q. And the samples shown are true samples?

A. Yes, sir.

Q. What is the next process?

A. The first step after the clarification process, after making right the temperature and density is the straining of the liquid for the removal of the insoluble mechanical impurities contained in the liquid. This is done with bag filters of which we have the photograph No. 26. The bag is shown on photograph No. 25. This straining removes the insoluble mechanical impurities that remain in the liquor, and cleanses it for further filtration. That is done with bone black. We have also an exhibit of the bags, through which we strain this liquor, before passing it through the bone black filtration. It is the bag Exhibit No. 38.

Q. How is that bone black used in filtration?

A. I have not taken into consideration some of these exhibits, that should go with what I have stated. This Exhibit No. 12, and this line of exhibits illustrates the sugar
24 in the process of improvement effected upon it as we go along. No. 12 is the exhibit of the melted raw sugar.

Q. What is the color of that?

A. It is a very dark brown color now. That is taken from the melters before the process of clarification, bag filtration and bone black filtration is put upon the liquor This is exhibit No. 13, an exhibit of the scum or dirt that we take out of these bags after straining, and remove it by methods of pressure through the scum press.

Q. Describe that scum product?

A. Well, it is largely dirt and mud matter that comes from the growth of the cane in the raw state.

Q. Black in color?

A. Yes, sir; black in color; it is apparent here in the sample.

Q. Is it fit for any purpose?

A. We have not yet found any purpose for it, but it costs us considerable money to remove it from the product.

Q. How much scum do you get in your process, approximately?

A. That would depend a great deal upon the grade of the sugar, the higher the grade, the less dirt; in the lower grade we get a great deal, 25 or 30 thousand pounds a day, from our bags, extracting it afterwards through this scum press and throwing it out.

Q. Does that photograph No. 27 show the scum press?

A. Yes, sir

Q. Now, go on with the bone black process, which acts as a filter?

A. After these processes of clarification and bag filtration, when the liquor is in that condition, the next process is to pass it through the bone filtration, which gives it a high filtration color. The bone black is made from pure animal bone, dissolved, shown in Exhibit No. 14. We place this bone black in large cylinders, 10 feet in diameter and 20 feet in height, containing large quantities, from 50 to 60 thousand pounds, and first strain the liquor through this mass of bone black, as it is there shown in the exhibit, where it is shown as Number 15.

Q. What is the color of No. 15?

A. Almost white.

Q. Almost as white as water, is it not?

A. Yes sir, we have not an exhibit of the bone black filter, we were unable to get a photograph of it, but we got a blue print No. 28, where the liquor is passed through the bone black in the way described, and the pores of the bone black absorb the insoluble matter and impurities, that are in liquor, which have not been removed by the bag, filtration process as above described. All of the above operations have been gone through with for preparing it for the purpose of recrystalizing it into grain.

Q. When you get that pure liquor, what do you do with it then?

A. Take the liquor in the form that it is shown here No. 15, and draw it into the vacuum pan, for crystalizing and forming the grain. The grain has been at once all totally dissolved in the preliminary process, and after this cleansing and purification, it is necessary to recrystalize it into grain, and we have it conducted into the vacuum pan, where, under a vacuum, the

grain is formed again in the hands of the boilers, who are skilled in the business, and formed into proper crystals, by machinery again. We have a sample of it here, No. 16, which is a specimen of the condition of the sugar formed from this liquor, No. 15, after crystalizing in the vacuum pan.

Q. What is the appearance in color of the No. 16 product in the vacuum pan?

A. The appearance shows a great deal of crystalized grain, in solution with considerable uncrystalized syrup. The color is almost white, rather yellowish. Well, that is about the average sample of what is boiled from it.

Q. Has the grain been formed in Exhibit No. 16,
26 which you show there?

A. Yes, sir the grain is already formed.

Q. That is the grain which has been built up in the vacuum pan?

A. Yes, sir; from the liquor as shown in No. 15.

Q. Can the workman who controls the operation of the vacuum pan, control the size of the grain, or form different sizes?

A. Yes, sir.

Q. As a matter of fact does your company form different sized grains for different purposes?

A. Yes, sir, for different purposes we do.

Q. Then it is a matter of will in whoever controls the vacuum pan?

A. A matter of will.

Q. What is No. 16 called?

A. Magma in the form in which it is dropped from the vacuum pan.

Q. When the contents of the vacuum pan are ready for the further process, what is the next step?

A. The next step is the drying of the sugar by the process of centrifugaling, which is conducted in the centrifugal machine. We have here a view in the photograph No. 31, of the centrifugal floor in one of our buildings showing these machines. These machines are driven by power, revolving at a high rate of speed, perhaps a thousand revolutions per minute and throw off the syrup that is dropped from the vacuum pan, together with the grain. The process dries the sugar and puts it into the form shown in exhibit No. 17.

Q. It leaves the grain in the centrifugal and throws off the syrup?

A. Yes, sir, throws off the syrup. It is No. 16 as dropped from the pan, and this is No. 17 after being in the centrifugal.

Q. What is the color and general appearance of No. 17?

A. The color is white, the appearance is white.

Q. And the grain?

27 A. The grain is perfect in form, each grain.

Q. It is not a liquid?

A. No, sir; it is dried by the process of the machine as shown in No. 31.

Q. After the process in the centrifugal, what is the next step?

A. That would depend upon the product we were making. If we were making granulated sugar, we would conduct the sugar through the granulating drums, for further drying. Exhibit 33 is a photograph of these granulating drums, where the sugar is revolved through these drums, and by the drying process of hot air, the remaining moisture, which is in the sugar after leaving the centrifugal machines, is driven off and the sugar made thoroughly dry, giving it the appearance it would have as a finished product.

Q. What is the finished product made by that process?

A. Standard granulated sugar.

Q. That is the specific and true name by which it is known?

A. Yes, sir.

Q. Have you an exhibit of that product?

A. Yes, sir; No. 21 is the finished product.

Q. What is the appearance and quality of that sugar shown by Exhibit 21, as granulated?

A. The appearance is perfectly white in color, the grain is sparkling white and the sugar is thoroughly dry and as pure as the refining process can make it.

Q. You call that pure sugar?

A. Yes, sir.

Q. What is the degree of impurity approximately speaking, in this sugar?

A. Not more than 1-10.

Q. That is 1-10 of 1 per cent.?

A. Yes, sir.

Q. What other finished products do you make, under their specific names?

A. We make a brand that the confectioners call

28 for largely, shown in Exhibit No. 22, "Confectioners A." These earlier processes of melting and clarification and reboiling and so on are conducted in the same way. It is simply in boiling a larger grain and afterwards the process of drying in the granulator is omitted in this sugar shown in No. 22.

Q. What is the grain quality shown in No. 22?

A. It is a larger grain and the same granulation, but there

is more moisture left in this sugar, not shown in the granulated.

Q. For what use is that sugar bought?

A. For candy making, largely for confectioners' use.

Q. It is made for that trade?

A. Made for that trade almost entirely.

Q. It is used for making syrups?

A. It is used for making rock candy, I believe, and for other dealers; I do not know what particular trade it goes to.

Q. It is used for further manufacture, as a rule?

A. Yes, sir; it is not in the form that sugar is that we largely use for table purposes, although perfectly good for that purpose, but owing to the form of granulated sugar it is more in general use.

Q. Now, what are your other finished products?

A. No. 19 is a form of sugar made in moulds, the earlier processes being largely the same as described. The sugar is pressed into moulds, and dried in an oven; it is called cube sugar.

Q. What is the form and appearance of cube sugar?

A. The form is that of a cube; the appearance is perfectly white, and there is a large degree of hardness in the cube itself.

Q. What is its quality; is it the same as granulated sugar?

A. The same as granulated sugar, only the difference in form.

Q. What name is that sugar known by?

A. As cube sugar.

Q. That is its distinctive name in the trade generally?

A. Yes, sir; we also have a photograph of the ma-
29 chine by which this sugar is made. The photograph No. 32, cube or block sugar is made from moulds as shown.

Q. The photograph shows a series of revolving moulds pressing the sugar?

A. Yes, sir; the sugar passes through a hopper above, and passes into moulds, and as the sugar is received in the plate, the machine levels the sugar, and presses it out into the form of cubes.

Q. How long after it is pressed in the machine has it to be dried?

A. 10 hours.

Q. What other finished product have you, if any?

A. We have the powdered sugar, No. 20.

Q. What is the appearance and color?

A. The appearance and color a dead white, perfectly white, the difference being in the grain, all the earlier process of manufacture being similar to these described, under the head of gran-

ulated sugar, but the grain is perfectly broken by the powder mills.

Q. The product is fine powder?

A. Yes, sir; the grain is not distinguishable in it; it has a soft mealy feeling to the touch.

Q. What is the distinctive name of that product?

A. Powdered sugar would be the distinctive name by which it is known and called for; different brands of powder are known to different manufacturers.

Q. But powdered sugar is the particular name to designate that particular quality.

A. Yes, sir; that is what it is called. We have a photograph of the powder mills from which this sugar, after the boiling of the grain, is taken to the powder mills and crushed into the form as shown. That is Exhibit 34 of the powder mill.

Q. What does the process of powdering consist of?

A. A series of revolving discs, revolving at a high rate of speed thoroughly crushes the grain in the sugar, which was in the form of granulated sugar, reducing it to a soft meal, by the friction of the discs at a high rate of speed.

Q. What other product have you in your establishment if any?

A. These are the only products in the sugars we are now making.

Q. Now, in the machine, in the centrifugal, as I understand it, the sugar is left in the machine and the liquor is thrown off. What becomes of that liquor?

A. Exhibit No. 18 shows the liquor as it is thrown off. In the highest stages of boiling, this liquor contains a great deal of sugar that is not crystalized out at the first evaporation; that is thrown back into the vacuum pan and boiled for that grain.

Q. It goes into the same form?

A. Yes, sir.

Q. What is the general appearance and quality of the liquor?

A. As shown in the sample taken from high boilings, it is white, and has a strong heavy density, and is sugar suitable again for recrystalizing.

Q. This grain has not been formed in the first process of boiling?

A. No, sir; not formed in the first process.

Q. What becomes of that liquor, when it becomes uneconomical to further crystalizing it? What is done with the product?

Q. That product is known as molasses. When our methods

of refining do not make it economical for the extraction of further sugar, that product is known as molasses and is part of the product of the refinery.

Q. When the liquor gets low in sugar?

A. Yes, sir; when it has impurities which it costs too much to extract.

Q. Have you a sample of molasses?

A. Yes, sir; sample No. 23 is the product of mo-
31 lasses and illustrates the amount of impurities that have been collected in this product by process of refining.

Q. What is the color and general appearance of that sample?

A. Molasses has a clear color, being very dark. The clearness comes because of the process of filtration and straining that have been gone through with, but the color of the impurities not taken out, leaves the product very dark. It is a by product.

Q. You do not refine molasses as such?

A. No, sir.

Q. You do not buy molasses?

A. No, sir.

Q. What molasses you have there is the refuse of the sugar?

A. Yes, sir.

By the Court:

Q. Do I understand you to say that you do not buy molasses?

A. No, sir; we do not.

By Mr. Carroll:

Q. Are there any other methods entering into the refining process that you wish to speak of; bone black, for instance? Is there not a by process in that?

A. No, sir; it is not a by process, but there is a large amount of work put in on this element of bone black, that enters into refining, and a great deal of mechanical process in revivifying, burning and making it suitable for use again, keeping it in a quality for re-evaporation. A large amount of the maintenance of the refinery is the expense of keeping this up for bone black filtration. We have here in Exhibit No. 29, a picture of a kiln, in this establishment, for the re-burning of this bone black. After the liquor has passed through it, the bone black passes into wrought iron retorts, the heat is applied and the bone black is revivified, which costs a great deal of work.

32 Q. The object is to burn out what?

A. To burn out the mechanical matter that was in the sugar, taken out of it by the pores of the bone black. We cleanse the bone black by burning.

Q. Have you any processes of evaporating weak liquor?

A. That is one of the products of the straining of the bags, and also from the bone black evaporators. There is a large amount of liquor comes out that is not up to the proper density, and we evaporate that in one of our appliances, known as evaporators, where this liquor is put into condition again, for the purposes of going through the process of refining. It is mainly economy in the use of steam. It is photograph No. 37, called the evaporating process. I have also had some views taken of the different parts of the establishment, showing an immense quantity of machinery and boilers and so on, that we have in our buildings.

Q. Do you use steam in the process of refining?

A. Yes, sir; very extensively.

Q. For what?

A. For the use of the steam engines and pumps also, in the direct process of the work in melting, clarification work, and very largely for re-crystalizing into grain. These are the largest steam uses in any refinery, the re-crystalizing of the liquor again into new grain.

Q. How much coal do you use every year in that establishment?

A. From 75 thousand to 80 thousand tons.

Q. Each year?

A. Yes, sir.

Q. You spoke of power; have you any engine and pumping machinery there?

A. Yes, sir.

Q. That is necessary for all your work there?

A. Yes, sir; we have a view of some of our large engines, and rooms showing views of some of our engines and pumps and other appliances that we are forced to use.

33 Q. Have you these photographs marked?

A. Yes, sir; No. 36 and No. 36a, two views of power pumping machinery. All the exhibits in fact show in the photograph, the large amount of power and steam that is used in the process of refining.

Q. Now as to the amount of power, is it not a fact that the same process is necessary, in a small house, as in a large house for refining?

A. For refining it would be.

Q. If it was a small refining house, you would have to conduct the same operations that you have detailed, as applying to a large house?

A. Yes, sir; the process is the same.

Q. It is just the question of amount?

A. Yes, sir; the amount and the simplicity with which it could be conducted in the matter of appliances.

Q. Now, as to the different grades of sugar, do you refine higher grades as well as lower grades?

A. Yes, sir; all grades.

Q. Are the processes which you have mentioned, as necessary for refining high grades, as for low grades of sugar?

A. Yes, sir; just as much so, not so largely and not so expensively, but the salient features are all the same.

Q. There are not as much impurities in the higher grades as in the lower, but there are impurities?

A. Yes, sir; these we would extract.

Q. Could they be extracted by any other method than remelting and crystalizing of the sugar?

A. We know of no other way.

Q. You put all sugars through these operations?

A. We put all sugars through these operations, no matter how high the grade may be. Here are two more photographs. No. 35 is a view of our boiler house, which gives an
34 idea of the amount of steam we have to generate every day. We have 24 of such boilers. Photograph No. 30 is the vacuum pan, we have also a photograph of that.

Q. What character of labor do you employ in these processes, skilled or unskilled labor?

A. We employ some skilled labor and a large amount of unskilled.

Q. What character of skilled labor is necessary?

A. In the refining process itself, perhaps the most skillful is the sugar boiler, because it would take a longer time to learn the details of that business than any other.

Q. Trained labor is necessary for that purpose?

A. Yes, sir; trained labor is necessary for that purpose, to make a good product in all departments, skilled labor is necessary.

Q. How many men do you employ in this establishment?

A. 500 or 600.

Q. What is the superficial area of that plant, give some idea of the extent that is necessary for these operations?

A. We have seven hundred thousand square feet of space in the building.

Cross Examined by Mr. Lavillebeuvre.

Q. Your company purchases raw, crude sugars?

A. Yes, sir.

Q. And subjects them to the process which you have just described?

A. They do.

Q. They then sell them?

A. Yes, sir.

Q. Does your company purchase sugar cane in the stalk, and subject it to the same processes that you have described?

A. No, sir.

Q. Does your company buy the cane juice, as originally extracted from the cane itself, subject it to the processes which you have just described and then sell it?

35 A. No, sir.

J. T. WITHERSPOON, sworn for the defendant, says:

By Mr. Carroll:

Q. What is your position with the defendant company?

A. I am local manager.

Q. You have heard Mr. McFetridge's testimony?

A. Yes, sir.

Q. That is practically correct as far as you know?

A. Yes, sir.

Q. Does your company refine any other sugar than its own sugar?

A. No, sir.

Q. It never takes the sugar of any body else and refines for pay?

A. No, sir.

Q. It buys sugar and refines that sugar?

A. Yes, sir.

Q. How does the marketable value of the refined product, which you turn out, compare with the grades of sugar that you buy, it is improved in value?

A. It is improved to a considerable extent in value.

Q. By refining you have improved the value of that sugar?

A. Considerably.

Q. How much?

A. That depends entirely upon the quality you take. For instance, the difference between this sugar exhibit No. 5 and granulated sugar, would probably amount to from 2½ to 3 cents a pound, whereas the difference between this grade of Louisiana sugar No. 1 and this grade of Cuban sugar No. 10 would probably amount from ¾ of a cent to ½ a cent a pound, according to the test.

Q. From ten to fifty per cent in value, you increase it by your refining process?

A. Yes, sir.

Q. I want to ask you whether the defendant's refinery here,

is the successor of the old Louisiana Sugar Refining Company?

A. Yes, sir.

Q. It is the same house?

A. It is the same house, the same office, the same building, with the exception of probably some new buildings
36 erected since.

Q. Was your company ever called upon to pay license tax, either by the state or by the city, before the institution of a suit by the state a few years ago?

A. I think not, but I am not clear on that point, because I have only occupied my present position for a year. But I do not know of any demand being made excepting this one by the city.

JOHN McFETRIDGE, recalled on behalf of the defendant, says:

By Mr. LaVillebeuvre:

Q. You are the gentleman who testified as to what this defendant refinery did, in the case of the State of Louisiana against the American Sugar Refinery?

A. Yes, sir; I am.

Mr. Carroll on behalf of the defendant now files an exception of no cause of action, which counsel for the plaintiff agrees may be referred to the merits.

Mr. Carroll on behalf of the defendant offers in evidence the testimony of the two foregoing witnesses.

He also offers the exhibits numbered from 1 to 23, testified to and identified with the testimony of Mr. McFetridge.

He also offers the photographs numbered from 24 to 27, inclusive. 29 to 35, inclusive. 36, 36a and 37, and the blue print No. 28. Also the filter bag No. 38.

And it is agreed between the city attorney and the counsel for the defendant, both here present, that in case of a writ of error herein, the above exhibits, photographs, blue print and bag, may be taken up to the Appellate Court, in the original with the consent and permission of the Court.

37 Mr. Carroll moves the Court to direct the jury to return a verdict in favor of the defendant, on the evidence and proofs adduced before them.

Mr. LaVillebeuvre for the plaintiff, also moves the Court

to direct the jury to render a verdict in favor of the plaintiff, on the evidence and proofs submitted before them.

And after hearing argument on both motions, the Court took time to consider.

Adjourned.

New Orleans, La., January 29th, 1900.

The Court met this day pursuant to adjournment.

Present: His Honor Charles Parlange, Judge, with a jury and all of counsel present.

The Court after considering the motions made by the respective counsel to direct the jury to render a verdict for the plaintiff and the defendant respectively, now denies the motion made by the defendant's counsel, overrules the exception of no cause of action, refuses all plaintiff's charges and grants the motion made by the plaintiff's counsel, and directs the jury to render a verdict for the plaintiff for the amount claimed.

And thereupon Mr. Carroll for the defendant excepts to the Court overruling his exception; also to the refusal of the Court to grant general and special charges, and excepts to the ruling of the Court in directing a verdict for the plaintiff. All the testimony and evidence heard on the trial to be made part of the bills of exception.

Samples of ingredients in bottles, used in products of refineries, being exhibits numbered from 1 to 23, inclusive; photographs numbered from 24 to 27 inclusive, 29 to 35 inclusive, 36, 36a and 37; blue print number 28; also filter bag number 38.

Offered by defendant in connection with testimony of John McFetridge.

Note.—Said offerings are to be taken up to the Appellate Court, in the originals, in accordance with agreement
38 of counsel copied at page 36 of this transcript.

Ordinance No. 14,884, of the City of New Orleans—Council Series—offered by plaintiff and filed January 16, 1900, referred to in bill of exceptions and made part thereof.

Note.—Title and sections 1, 2, 3, 4 and 15 only, of said ordinance, are copied into this transcript in accordance with agreement of counsel, copied at page 44 of this transcript.

LICENSE ORDINANCE.

Mayoralty of New Orleans.
City Hall, December 14, 1898.
No. 14,884, Council Series.

An ordinance to levy, collect and enforce payment of annual

license taxes upon all persons, associations of persons, or business firms and corporations, pursuing any trade, profession, vocation, calling or business in the City of New Orleans, except those expressly exempted from such license taxes by Article 229 of the Constitution.

Section 1. Be it ordained by the Council of the City of New Orleans, that there is hereby levied an annual license tax for the year A. D. 1899, upon each person, association of persons, or business firms and corporations, pursuing any trade, profession, vocation, calling or business, except those expressly exempted from such license tax by Article 229 of the Constitution.

Sec. 2. Be it further ordained, that on the second day of January, 1899, the city treasurer shall begin to collect, and shall collect as fast as possible from each of the persons or business firms, associations of persons and corporations pursuing any trade, profession, vocation, calling or business, in the City of New Orleans, a license tax as hereinafter graduated. All licenses shall be due and collectable during the first two (2) months of the year, and all unpaid licenses shall become delinquent on the first day of March; and all firms who
39 commence business after that date shall become delinquent, unless the license is paid within ten days.

Sec. 3. Be it further ordained, that the annual license for all kinds of business hereinafter named except as afterwards provided shall be graduated as required by law.

Manufacturers.

Sec .4. That for carrying on each business of manufacturing subject to license under Article 229 of the Constitution, the license shall be based on gross annual receipts of said business as follows, to-wit:

First Class—When said receipts are ten million dollars or more, the license shall be eight thousand dollars, $8,000.

Second Class—When the said receipts are nine million dollars or more, and under ten million dollars the license shall be seven thousand dollars, $7,000.

Third Class—When said receipts shall be eight million dollars or more and under nine million dollars the license shall be five thousand six hundred dollars, $5,600.

Fourth Class—When said receipts are seven million dollars or more and under eight million dollars, the license shall be forty-nine hundred dollars, $4,900.

Fifth Class—When said receipts are six million dollars or

more and under seven million dollars, the license shall be forty-two hundred dollars, $4,200.

Sixth Class—When said receipts are five million dollars or more and under six million dollars, the license shall be thirty-five hundred dollars, $3,500.

Seventh Class—When said receipts are four million dollars or more and under five million dollars, the license shall be twenty-eight hundred dollars, $2,800.

40 Eighth Class—When said receipts are three million dollars or more and under four million dollars the license shall be twenty-one hundred dollars, $2,100.

Ninth Class—When said receipts are two million dollars or more and under three million dollars, the license shall be fourteen hundred dollars, $1,400.

Tenth Class—When said receipts are one million dollars or more and under two million dollars, the license shall be seven hundred dollars, $700.

Eleventh Class—When said receipts are seven hundred and fifty thousand dollars or more and under one million dollars, the license shall be five hundred and twenty-five dollars, $525.

Twelfth Class—When said receipts shall be five hundred thousand dollars or more and under seven hundred and fifty thousand dollars, the license shall be three hundred and fifty dollars, $350.

Thirteenth Class—When said receipts are four hundred thousand dollars or more, and under five hundred thousand dollars the license shall be two hundred and eighty dollars, $280.

Fourteenth Class—When said receipts are three hundred thousand dollars or more, and under four hundred thousand dollars the license shall be two hundred and ten dollars, $210.

Fifteenth Class—When said receipts are two hundred thousand dollars or more and under three hundred thousand dollars the license shall be one hundred and forty dollars, $140.

Sixteenth Class—When said receipts are one hundred and fifty thousand dollars or more and under two hundred thousand dollars the license shall be one hundred and five dollars, $105.

Seventeenth Class—When said receipts are one hundred thousand dollars or more, and less than one hundred

41 and fifty thousand dollars, the license shall be seventy dollars, $70.

Eighteenth Class—When said receipts are ninety-five thousand dollars or more, and less than one hundred thousand dollars, the license shall be sixty-five and one-half dollars, $65.50.

Nineteenth Class—When said receipts are ninety thousand dollars or more and less than ninety-five thousand dollars, the license shall be sixty-three dollars, $63.

Twentieth Class—When said receipts are seventy-five thousand dollars or more and under ninety thousand dollars, the license shall be fifty-two and one-half dollars, $52.50.

Twenty-first Class—When said receipts are fifty thousand dollars or more, and less than seventy-five thousand dollars, the license shall be thirty-five dollars, $35.

Twenty-second Class—When said receipts are forty thousand dollars or more and less than fifty thousand dollars, the license shall be twenty-eight dollars, $28.

Twenty-third Class—When said receipts are thirty thousand dollars or more and less than forty thousand dollars, the license shall be twenty-one dollars, $21.

Twenty-fourth Class—When said receipts are twenty-five thousand dollars or more and less than thirty thousand dollars, the license shall be nineteen and one-half dollars, $19.50.

Twenty-fifth Class—When said receipts are less than twenty-five thousand dollars the license shall be fifteen dollars, $15.

Miscellaneous.

Sec. 15. Be it further ordained, etc., that for carrying on each business of gaslight, electric light, waterworks, shooting the chutes, minature railroads, saw mills employing ten
42 or more hands, telegraphing (including local and district telegraph,) telephoning, express company, cotton compress or ginnery, cotton pickery, slaughterhouse distilling and rectifying alchoholic or malt liquors, brewing ale, beer, porter or other malt liquors, manufacturing tobacco, cigars or cigarettes, refining sugar and molasses, or either of them, manufacturing cotton seed oil, oil cake or cotton seed meal, the license shall be based on the gross annual receipts of each person, association or persons, business firm or corporation engaged in said business, as follows:

First Class—When gross annual receipts are two million five hundred thousand dollars and over, the license shall be six thousand two hundred and fifty dollars, $6,250.

Second Class—When gross annual receipts are two million two hundred and fifty thousand dollars or more, or less than two million five hundred thousand dollars, the license shall be five thousand seven hundred and fifty dollars, $5,750.

Third Class—When gross annual receipts are two million dollars or more and less than two million two hundred and fifty thousand dollars, the license shall be five thousand dollars, $5,000.

Fourth Class—When the gross annual receipts are one million

seven hundred and fifty thousand dollars or more and less than two million dollars, the license shall be four thousand three hundred and seventy-five dollars, $4,375.

Fifth Class—When the gross annual receipts are one million five hundred thousand dollars or more and less than one million seven hundred and fifty thousand dollars, the license shall be three thousand seven hundred and fifty dollars, $3,750.

Sixth Class—When the gross annual receipts are one million two hundred and fifty thousand dollars or more and
43 less than one million five hundred thousand dollars, the license shall be three thousand one hundred and twenty-five dollars, $3,125.

Seventh Class—When the gross annual receipts are one million dollars or more and less than one million two hundred and fifty thousand dollars, the license shall be two thousand five hundred dollars, $2,500.

Eighth Class—When gross annual receipts are seven hundred and fifty thousand dollars or more and less than one million dollars, the license shall be one thousand eight hundred and seventy-five dollars, $1,875.

Ninth Class—When gross annual receipts are five hundred thousand dollars or more and less than seven hundred and fifty thousand dollars, the license shall be one thousand two hundred and fifty dollars, $1,250.

Tenth Class—When gross annual receipts are two hundred and fifty thousand dollars or more and less than five hundred thousand dollars, the license shall be six hundred and twenty-five dollars, $625.

Eleventh Class—When gross annual receipts are two hundred thousand dollars or more and less than two hundred and fifty thousand dollars, the license shall be five hundred dollars, $500.

Twelfth Class—When gross annual receipts are one hundred and fifty thousand dollars or more and less than two hundred thousand dollars, the license shall be three hundred and seventy-five dollars, $375.

Thirteenth Class—When the gross annual receipts are one hundred thousand dollars or more and less than one hundred and fifty thousand dollars the license shall be two hundred and fifty dollars, $250.

Fourteenth Class—When gross annual receipts are seventy-five thousand dollars or more and less than one hundred thousand dollars, the license shall be one hundred and eighty-seven dollars and fifty cents, $187.50.

Fifteenth Class—When gross annual receipts are fifty thous-

and dollars or more and less than seventy-five thousand, the license shall be one hundred and twenty-five dollars, $125.

Sixteenth Class—When gross annual receipts are thirty-seven thousand five hundred dollars or more and less than
44 fifty thousand dollars the license shall be ninety-three dollars and seventy-five cents, $93.75.

Seventeenth Class—When the gross annual receipts are twenty-five thousand dollars or more, and less than thirty-seven thousand five hundred dollars, the license shall be sixty-two dollars and fifty cents, $62.50.

Eighteenth Class—When gross annual receipts are over twenty thousand dollars and less than twenty-five thousand dollars, the license shall be fifty dollars, $50.

Nineteenth Class—When gross annual receipts are over fifteen thousand dollars, and less than twenty thousand dollars, the license shall be thirty-seven dollars and fifty cents, $37.50.

Twentieth Class—When gross annual receipts are less than fifteen thousand dollars, the license shall be twenty dollars, $20.

STIPULATION OF PARTIES AS TO TRANSCRIPT.

Filed February 10, 1900.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12827.
The American Sugar Refining Co.

It is hereby stipulated between the parties hereto that all of the Ordinance No. 14,884, C. S., offered in evidence by plaintiff, may be omitted from the transcript, except the following designated portions, to-wit:

The title and Sections One, Two, Three Four anf Fifteen.

(Signed) C. H. LaVILLEBEUVRE,
Attorney for Plaintiff,

(Signed) CARROLL & CARROLL,
Attorneys for Defendant.

DEFENDANT'S PETITION FOR WRIT OF ERROR AND ORDER THEREON.

Filed February 10, 1900.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
45 vs. No. 12,827.
The American Sugar Refining Co.

The petition of the American Sugar Refining Company, defendant herein, respectfully represents:

That petitioner, defendant in the above entitled cause, feels itself aggrieved by the verdict of the jury and the judgment of the Honorable the Circuit Court of the United States for the Eastern District of Louisiana, entered thereon, entered in this cause on the twenty-ninth day of January, 1900 and signed on the 10th day of February 1900, and desires to be allowed to prosecute a writ of error therefrom to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit under and according to the laws of the United States in that behalf made and provided, further, desires that an order be made fixing the amount of bond and security which defendant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in said Circuit Court may be suspended and staved until the determination of said writ of error by the Circuit Court of Appeals, aforesaid; and

That petitioner presents and files herewith an assignment of errors to be considered on said writ of error.

Petitioner further shows that it is proper and necessary that the offers in evidence of the twenty-three bottles of materials, one filter bag, fourteen photographs and one blue print, should be preserved in the custody of the Court and be transmitted to the said Circuit Court of Appeals as a part of the transcript for consideration on said writ of error.

Wherefore, petitioner, defendant herein, prays that an order may be entered herein, allowing a writ of error from the judgment hereinabove set forth to be returnable to the United States Circuit Court of Appeals for the Fifth Circuit, according to the laws of the United States, and that an order may be entered fixing the amount of bond to be given by said defendant for said writ of error, the same to operate as a supersedeas and to stay and suspend all further proceedings in the said Circuit Court until the determination of said writ of error by said Honorable the United States Circuit Court of Appeals for the Fifth Circuit, and that upon consideration of the said writ of

error, the said judgment be reversed and judgment be rendered in favor of defendant, dismissing plaintiff's suit.

46 (Signed) CARROLL & CARROLL,
Attorneys for Defendant.

ORDER.

Let a writ of error be, and is hereby granted and allowed to The American Sugar Refining Company, defendant in the above entitled cause, as hereinabove prayed for upon its furnishing bond according to law in the sum of ten thousand dollars, the same to operate as a supersedeas, and to stay and suspend all further proceedings in the United States Circuit Court until the determination of said writ of error by the Honorable the Circuit Court of Appeals for the Fifth Judicial Circuit, the said writ of error to be made returnable into the said United States Circuit Court of Appeals for the Fifth Circuit within thirty days from the date hereof, according to law.

And it is further ordered that the offers in evidence of the twenty-three bottles of materials, one filter-bag, fourteen photographs and one blue print be made part of the transcript on said writ of error and be preserved by the Clerk of the Circuit Court and be by him transmitted in the original to the said United States Circuit Court of Appeals according to law.

New Orleans, Louisiana, February 10th, 1900.

(Signed) CHARLES PARLANGE, U. S. Judge.

ASSIGNMENT OF ERRORS.

Filed February 10, 1900.

United States Circuit Court, Eastern District of Louisiana.

City of New Orleans
vs. No. 12827.
The American Sugar Refining Co.
Assignment of Errors.

Now comes the American Sugar Refining Company, defendant herein, by its undersigned counsel, and in connection with its petition for a writ of error herein, makes the following assignment of errors:

1. The Circuit Court erred in its judgment of December

19th, 1899, in refusing to order plaintiff to amend its pleadings and state its cause of action as a bill of equity,
47 and in allowing plaintiff to amend its original pleading by striking out its prayer for injunction and praver for lien and privilege and thereafter prosecute its suit as an action at law.

2. That the Circuit Court erred in overruling defendant's exception of no cause of action.

3. That said Court erred in refusing to instruct the jury to bring in a verdict for defendant, as asked by defendant, upon the grounds:

(1) That sugar refining is manufacturing and exempt from license taxation, under Article 229 of the Constitution of Louisiana;

(2) That defendant's business of sugar refining, as established by the uncontradicted evidence, constitutes defendant a manufacturer and it therefore is exempt from license taxation.

(3) That the ordinance under which defendant is sought to be taxed is contrary to the Fourteenth Amendment to the Constitution of the United States and is void as to defendant in that it discriminates in favor of sugar refiners who may also be planters.

4. That said Court erred in refusing to instruct the jury, as requested by defendant, that the business of refining sugar as carried on by defendant is a manufacturing business, and that defendant, as such manufacturer, is exempt from payment of license taxation to the State of Louisiana.

5. That said Court erred in refusing to instruct the jury, as requested by defendant, that the City Ordinance No. 14,884, under which the license tax was claimed from defendant, is contrary to the Constitution of the United States of America, and particularly the Fourteenth Amendment to said Constitution.

6. That said Court erred in peremptorily instructing the jury to bring in a verdict for the plaintiff.

Upon consideration whereof, defendant prays that the verdict and judgment entered in this cause be reversed and that defendant have judgment as originally prayed for by it in its answer and exception filed herein.

(Signed) CARROLL & CARROLL,
Attorneys for Defendant.

48 BOND.

Filed February 10, 1900.

Know all men by these presents, that we, the American Sugar Refining Company, as principal, and Jackson T. Witherspoon as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of ten thousand dollars, to be paid to the said City of New Orleans, its certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents. Sealed with our seals and dated this 10th day of February, in the year of our Lord one thousand nine hundred.

Whereas, lately, at a Circuit Court of the United States, Fifth Judicial Circuit holding session in and for the Eastern District of Louisisana, at New Orleans, in a suit pending in said Court, between the City of New Orleans, plaintiff, and The American Sugar Refining Company, defendant, No. 12,827, of the docket of said Circuit Court, a judgment was rendered against the said defendant, The American Sugar Refining Company, and the said American Sugar Refining Company, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of New Orleans, citing and admonishing it to be and appear before the United States Court of Appeals for the Fifth Circuit, to be held at New Orleans, Louisiana, within 30 days from the date hereof.

Now, the condition of the above obligation is such, that if the said The American Sugar Refining Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

49 For THE AMERICAN SUGAR REFINING CO.
(Signed) J. T. WITHERSPOON, Manager.
J. T. WITHERSPOON.

THE AMERICAN SUGAR REFINING COMPANY,
By CARROLL & CARROLL, Its Attorneys.
Sealed and delivered in the presence of
(Signed) JOSEPH W. CARROLL.

Approved by
(Signed) CHARLES PARLANGE, U. S. Judge.

(Indorsed on back:) No. 12,827. City of New Orleans vs. The American Sugar Refining Company. Bond.

50 United States of America, ss.

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court, before you, or some of you, between the City of New Orleans, plaintiff, and The American Sugar Refining Company, defendant, No. 12,827 of the docket of said Circuit Court a manifest error hath happened, to the great damage of the said The American Sugar Refining Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of February, in the year of our Lord one thousand nine hundred. E. R. HUNT,

[Seal] Clerk of the U. S. Circuit Court Eastern District of Louisiana.

By H. J. CARTER, Dy. Clerk.

Allowed by: CHARLES PARLANGE, U. S. Judge.

51 [Indorsed:] No. 12,827. City of New Orleans vs. The American Sugar Refining Company. Writ of Error. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Feby. 10, 1900. E. R. Hunt, Clerk.

52 The United States of America,

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States,

To the City of New Orleans—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, to be holden at the City of New Orleans, within 30 days from date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein The American Sugar Refining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said American Sugar Refining Company as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13 day of February, in the year of our Lord one thousand nine hundred.

CHARLES PARLANGE, Judge.

53 Received by U. S. Marshal, New Orleans, La., Feby., 13, 1900.

State of Louisiana,
Parish of Orleans.

On this 15th day of February, 1900, before the undersigned authority personally appeared T. I. Galbreth, Deputy United States Marshal (known to me as such), who being duly sworn, deposes and says that on the 14th day of February, 1900, he served this writ on the City of New Orleans, Louisiana, by handing the same to Hon. Walter C. Flower, Mayor of said city, in person, at the Mayor's parlor in said city; said Mayor's parlor being his public office.

T. I. GALBRETH, Dy. U. S. Marshal.

Sworn to and subscribed before me on this 15th day of February, 1900.

H. J. CARTER,
U. S. Commissioner.

[Indorsed:] R. E. United States Circuit Court, Eastern District of Louisiana. No. 12,827. American Sugar Refining Company, plaintiff in error, vs. City of New Orleans, defendant in error. Citition. Marshal's Retutn. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Feb. 15, 1900. E. R. Hunt, Clerk.

54 United States of America,

Circuit Court of the United States,, Fifth Circuit and Eastern District of Louisiana.

Clerk's Office:

I, Edward R. Hunt, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do hereby certify that the foregoing 53 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of The City of New Orleans versus The American Sugar Refining Company, No. 12827 of the docket of the said Court, excepting the exhibits transmitted in the original, as noted on page 37.

Witness my hand and the seal of said Court, at the City of New Orleans, this 1 day of March, A. D. 1900.

[Seal] H. J. CARTER, Deputy Clerk.

I, Charles Parlange, United States Judge for the Eastern District of Louisiana, do certify that H. J. Carter, whose name is signed to the above certificate as Deputy Clerk, of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Deputy Clerk of said Court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Deputy Clerk.

Given under my hand at the City of New Orleans, in said district, this 1 day of March, A. D. 1900.

CHARLES PARLANGE, Judge.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

November Term, 1899, May 23, 1900.

(Extract from Minutes).

American Sugar Refining Company
vs. No. 920.
City of New Orleans.

This cause was regularly called this day and submitted to the Court after argument by Mr. Joseph W. Carroll for plaintiff in error and by Mr. C. H. LaVillebeuvre for defendant in error.

November Term, 1899, May 29, 1900.

(Extract from the Minutes).

American Sugar Refining Company
vs. 920.
City of New Orleans.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the writ of error sued out in this cause be, and the same is hereby dismissed for the want of jurisdiction, but without prejudice to any right the parties may have to sue out a writ of error from the Supreme Court of the United States.

It is further ordered and adjudged by this Court that the plaintiff in error, the American Sugar Refining Company, and the surety on the writ of error bond herein J. T. Witherspoon, be condemned to pay the costs of this cause in this Court for which execution may be issued out of said Circuit Court.

(*Original filed May 31st, 1900*).

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 920.

THE AMERICAN SUGAR REFINING COMPANY, Plaintiff in Error,

versus

CITY OF NEW ORLEANS, Defendant in Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now, by its undersigned attorneys, The American Sugar Refining Company, plaintiff in error, and respectfully shows to the Court that petitioner conceives and is advised that there are error and injury to the prejudice of petitioner in the judgment herein rendered May 29th, 1900, dismissing petitioner's writ of error herein for want of jurisdiction, in this, to-wit:

1. That this Honorable Court erred in holding that it is without jurisdiction of said writ of error; but that, on the contrary, it is vested with sole appellate jurisdiction thereof under Section 6 of the Act of Congress of March 3d, 1891, as the suit is one in which the jurisdiction of the Circuit Court was invoked and attached solely because the parties thereto are citizens of different States.

2. That the Supreme Court of the United States has no jurisdiction to review the judgment of the Circuit Court under Section 5 of said Act of March 3d, 1891, as being a case in which the law of a State is claimed to be in contravention of the Constitution of the United States, because the jurisdiction of the Circuit Court was not invoked and did not attach because of the existence of a constitutional question in the suit, but the said Federal question was raised after the jurisdiction of said Circuit Court had already been invoked, and had attached, by reason of the diversity of citizenship of the parties to said suit.

3. That under the settled jurisprudence as announced by the Supreme Court of the United States in an unbroken line of de-

cisions, the ground upon which the jurisdiction of the Circuit Court is invoked and attaches, is alone looked to to determine the character of the controversy with reference to its review by the Appellate Court; and that, under said decisions, where the jurisdiction has attached solely because of the diversity of the citizenship of the parties, as in the case at bar, the Circuit Court of Appeals alone has appellate jurisdiction, notwithstanding other grounds of Federal jurisdiction may have subsequently arisen in or been injected into the suit by way of defense or otherwise. Wauton vs. DeWolf, 142 U. S. 965; American Constr. Co. vs. R. R. Co., 148 U. S. 372 (382); Colorado Central Mining Co. vs. Turck, 150 U. S. 138; Tennessee vs. Union and Planters' Bank, 152 U. S. 454; Borgmeyer vs. Idler, 159 U. S. 408; Oregon Ry. vs. Skottowe, 162 U. S. 490; Hanford vs. Davies, 163 U. S. 273; Press Pub. Co. vs. Monroe, 164 U. S. 105; Ex parte Jones, 164 U. S. 691; Third St. Ry. Co. vs. Lewis, 173 U. S. 457; Pope vs. Louisville, etc. Ry. Co., 173 U. S. 573.

Wherefore, upon consideration of the premises, petitioner respectfully prays that the judgment herein rendered May 29th, 1900, dismissing the writ of error herein for want of jurisdiction, be reconsidered and be annulled and vacated; that a rehearing be granted if such shall be deemed necessary and appropriate, or such other relief be accorded petitioner as may be right and proper; and that upon consideration of the writ of error herein, the judgment of the Circuit Court may be annulled, reversed and avoided as heretofore prayed for by petitioner; and petitioner prays for all such relief as is proper in the premises.

(Signed) CHARLES CARROLL,

" JOSEPH W. CARROLL,

Attorneys for the American Sugar Refining Company, Plaintiff in Error, Petitioner.

I, Joseph W. Carroll, of counsel for the above-named petitioner, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

(Signed) JOSEPH W. CARROLL.

NEW ORLEANS, May 30th, 1900.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

November Term, 1900, November 20, 1900.

(Extract from Minutes).

American Sugar Refining Company
versus No. 920.
City of New Orleans.

Ordered, that the petition for rehearing filed in this cause, be and the same is hereby denied.

OPINION.

(Filed May 29th, 1900).

UNITED STATES CIRCUIT OF APPEALS, FIFTH CIRCUIT.

November Term, 1899.

American Sugar Refining Company, Plaintiff in Error
versus No. 920.
City of New Orleans, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Louisiana. Before Pardee, McCormick and Shelby, Judges. By the Court.

This cause as presented and decided in the Circuit Court is one in which the Constitution and laws of the State of Louisiana are claimed to be in contravention of the Constitution of the United States; and, therefore, by the fifth section of the act of March 3rd, 1891, 20th statutes at large, 826, jurisdiction is conferred upon the Supreme Court to review by direct appeal the final judgment of the Circuit Court therein rendered. Penn. Mutual

Life Ins. Co. vs. Austin, 168 U. S. 685; Walla Walla City vs. Walla Walla Water Co., 172 U. S. 1.

As presented on this writ of error the controlling question involves the construction and application of the Constitution of the United States and we are of opinion that we should dismiss this writ of error on the authority of Carter vs. Roberts, and the Cincinnati, Hamilton and Dayton Railroad Co. vs. Thibaud, Admr., both recently decided by the Supreme Court of the United States, and City of Macon vs. Georgia Packing Company, 9 C. C. A. 262; Illinois Central Railroad Co. vs. Adams, 35 C. C. A. 635; City of Dawson *et al.* vs. Columbia Avenue Saving Fund, Safe Deposit Title & Trust Co. (not yet reported) heretofore decided in this Court.

The writ of error herein is dismissed with costs but without prejudice to any right the parties may have to sue out a writ of error from the Supreme Court of the United States.

Filed May 29, 1900.

J. M. McKEE, Clerk.

American Sugar Refining Company, Plaintiff in Error

versus No. 920.

City of New Orleans, Defendant in Error.

McCormick, Circuit Judge, dissenting.

The City of New Orleans, through its treasurer, proceeded in the Civil District Court of the Parish of Orleans to recover of the American Sugar Refining Company the sum of $6,250 claimed to be due for license for conducting the business of refining sugar in the City of New Orleans for the year 1899. The case was, on petition of the defendant company, (the plaintiff in error) removed from the State Court to the United States Circuit Court. The original proceeding in the State Court was instituted by rule, as authorized by law; but on motion to reform pleading in the United States Circuit Court the City withdrew its application for an injunction and its claim for a lien and filed on the law-side of the Court an ordinary petition for a moneyed demand. The petition for removal from the State Court to the United States Court recites that the controversy is between citizens of different States; that the American Sugar Refining Company at the time of the commencement of the suit was and still is a citizen of the State of New Jersey; and that the plaintiff, the City of New Orleans, was

then and still is a citizen of the State of Louisiana. In the State Court the plaintiff's pleading raised no Federal question, and the defendant therein was compelled to ground its motion for removal on the diverse citizenship of the parties. On that ground the Circuit Court took jurisdiction. In that Court the defendant by its pleadings presented the Federal questions involved in the case, of which the Court then acquired jurisdiction. There were other issues involved. There may have been no dispute or real question in reference to these other issues. The Circuit Court gave judgment for the City of New Orleans, and the American Sugar Refining Company sued out this writ of error.

With the utmost deference to the opinion of the majority of the Court, I submit that this case is not within the authority of the City of Macon vs. Georgia Packing Company, 9 C. C. A. 262, in which case this Court said: "As the parties are all citizens of the same State and district, the jurisdiction of the Court below rests entirely upon the case as one arising under the Constitution of the United States." For the same reason it appears to me that the instant case is not within the authority of Illinois Central Railroad Company vs. Adams, and others, 35 C. C. A. 635, in which cases it is said: "In one of these cases—the last one stated— the jurisdiction of the Circuit Court is dependent alone on the sufficiency of the bill in presenting these Federal, constitutional questions; and, if the Court arranges the parties in the other two cases according to their respective interests, they would probably also be dependent on the subject matter of the suits for jurisdictional averments."

In Carter vs. Roberts it was held that in all of the cases which are controlled by the construction or application of the Constitution of the United States a direct appeal lies to the Supreme Court; and that if such cases are carried to the Circuit Court of Appeals those Courts may decline to take jurisdiction; or, where such construction or application is involved, they may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance.

The plaintiff in the Circuit Court did not rest its right to recover on any construction or application of the Constitution of the United States. Its case was founded on an ordinance of the City resting for its support on the Statute and Constitution of the State of Louisiana. The defendant by its pleas could not, by admitting the claims of the plaintiff in the Circuit Court, except so far as they were affected by the Constitution of the United States, and urging its claim to the protection of the United States Con-

stitution, oust the jurisdiction of this Court to pass upon the case as made by the plaintiff. It therefore appears to me that the most that can be claimed under the authority of Carter vs. Roberts is that the Circuit Court of Appeals may decline to take jurisdiction; or it may certify the constitutional question and afterwards proceed to judgment; or it may decide the whole case in the first instance. Granting, *arguendo,* that the authority of the case of Carter vs. Roberts goes to that extent and can be relied upon to justify this Court in declining to take jurisdiction, it appears to me that it is equal authority for the proposition that this Court may decide the whole case in the first instance; and if it may, I respectfully submit that in this case it should. The plaintiff in error has invoked the jurisdiction of this Court by suing out the writ. The defendant in error does not question it.

I therefore am unable to concur in the judgment of the majority. I also think my position is supported by the cases of the United States vs. Jahm, 155 U. S. 109; New Orleans vs. Benjamin, 153 U. S. 511; Horner vs. United States, 143 U. S. 570; and Green vs. Mills, 69 Fed. Rep. 852.

Endorsed. Filed May 29, 1900.

J. M. McKEE, *Clerk.*

CERTIFICATE.

I, J. M. McKee, Clerk of the United States Circuit of Appeals for the Fifth Circuit, do hereby certify that the foregoing 54 pages, numbered from a to 53 inclusive, contain a true copy of the record and all proceedings had including the opinion of the Court in the case of

American Sugar Refining Co., Plaintiff in Error

versus No. 920.

City of New Orleans, Defendant in Error.

as fully and completely as the same now remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name, and affix the seal of said United States Court of Appeals at the City of New Orleans, this 8th day of January, A. D. 1901.

(Seal) J. M. McKEE,

Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

Supreme Court of the United States.

No. 535.—October Term, 1900.

The American Sugar Refining Company, Petitioner, *vs.* The City of New Orleans.	Petition for certiorari or mandamus to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 29, 1901.]

This was a petition for a writ of certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to this court for its review and determination the case of the *American Sugar Refining Company, Plaintiff in Error*, v. *The City of New Orleans, Defendant in Error, No.* 920, *November Term*, 1899; or in the alternative for a writ of mandamus to command the judges of said court to hear, try and adjudge said cause.

The petition alleged that on June 14, 1899, the city of New Orleans brought suit by rule in the civil district court for the parish of Orleans, Louisiana, against the American Sugar Refining Company for a city license tax for the year 1899 for the sum of $6,250 with interest thereon, claiming said license tax solely by virtue of the laws of Louisiana and an ordinance of the city of New Orleans, as an occupation tax for carrying on the business of refining sugar and molasses in that city; that the American Sugar Refining Company petitioned the District Court for an order removing the suit to the Circuit Court of the United States for the Eastern District of Louisiana, the petition for removal being based solely upon the ground that the defendant was a corporation of New Jersey, and the plaintiff, a corporation of Louisiana, which petition was granted, the bond required given, a certified copy of the record filed, and the suit docketed in the Circuit Court.

That thereafter, by order of the court, the city reformed its pleadings in some parts, "the only difference of substance between said reformed petition and the original rule being that said reformed petition omitted the formal prayer for a recognition of a lien and privilege on defendant's property, and for an injunction against defendant carrying on its business."

That the defendant answered:

"First. That it was a manufacturer, and as such exempt from license taxation under article 229 of the constitution of the State of Louisiana of 1898, which exempts all manufacturers from State and municipal license taxation, except those of distilled, alcoholic and malt liquors, tobacco, cigars and cottonseed oil; and

"Second. That the ordinance of the city of New Orleans under which said tax was claimed was based upon act No. 171 of the general assembly

of Louisiana of 1898, and that the said act was in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it exempted from license taxation planters and farmers who refine their own sugar and molasses, and thereby sought to make an illegal discrimination against those sugar refiners who were not planters and farmers, and denied to defendant, as one of such sugar refiners, the equal protection of the laws of the State of Louisiana; and that the said act and city ordinance based thereon were therefore unconstitutional and void as to defendant."

That the suit was tried before the court and a jury, and evidence was adduced showing the nature and character of defendant's business in support of its claim that it was a manufacturer, which evidence of the defendant was uncontradicted in every particular; and also showing that the gross receipts of defendant's business were of such amount that if liable at all for license tax, it was liable for the sum claimed; and defendant also filed an exception of no cause of action.

That at the close of the evidence defendant requested the court to direct the jury to render a verdict in its favor, which the court refused to do, and charged in plaintiff's favor, and plaintiff obtained a verdict and judgment. On defendant's application a bill of exceptions was duly settled and signed by the presiding judge; and the case carried on error to the United States Circuit Court of Appeals for the Fifth Circuit. The cause was there heard, and on May 29, 1900, judgment was rendered by the Circuit Court of Appeals dismissing the writ of error on the ground of want of jurisdiction. 104 Fed. Rep. 2. Petitioner thereupon applied for a rehearing, which was denied November 20, 1900.

Petitioner prayed for the writ of certiorari, or for the writ of mandamus as before stated. Leave was granted to file the petition, and a rule to show cause was thereupon entered, to which due return was made.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The jurisdiction of the Circuit Court rested on diverse citizenship, and not on any other ground, and had the Circuit Court of Appeals gone on and decided the case, its decision would have been final, and our interposition could only have been invoked by certiorari.

This was so notwithstanding one of the defenses was the unconstitutionality of the ordinance. *Colorado Min. Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691. These, and many other cases to the same effect, related to the appellate jurisdiction of this court over the Court of Appeals under the sixth section of the Judiciary Act of March 3, 1891, but they necessarily involved consideration of our jurisdiction under the fifth section, and that of the Court of Appeals under the sixth section. By the fifth section appeals or writs of error may be taken from the District or Circuit Courts direct to this court in any case that "involves the construction or applica-

tion of the Constitution of the United States;" "in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question;" "in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Section six provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review the final decisions of the District and Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States." The jurisdiction referred to is the jurisdiction of the Circuit Court, and as the judgment of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, it follows that the Court of Appeals has power to review the judgment of the Circuit Court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the Circuit Court attached, by reason whereof the case became embraced by section five.

Thus it was held in *Loeb* v. *Columbia Township Trustees*, 179 U.S. 472, where the jurisdiction of the Circuit Court rested on diverse citizenship, but the State statute involved was claimed in defense to be in contravention of the Constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the Circuit Court, although it was also ruled that the plaintiff might have carried the case to the Circuit Court of Appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the Circuit Court.

The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the Courts of Appeals are not made final it is provided that "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy exceeds one thousand dollars besides costs."

And the right to two appeals would exist in every case (the litigated matter having the requisite value,) where the jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution, laws or treaties of the United States, if such cases could be carried to the Circuit Courts of Appeals, for their decisions would not come within the category of those made final.

As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by

good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty of the United States, *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company*, 178 U. S. 239; and as those cases fall strictly within the terms of section five, the appellate jurisdiction of this court in respect of them is exclusive.

If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and also on grounds independent of that, a question expressly reserved in *Mining Company* v. *Turck*, 150 U. S. 138, and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment, (and the power to certify assumes the power to decide,) an appeal or writ of error would lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. *Union Pacific Railway Company* v. *Harris*, 158 U. S. 326.

In *Carter* v. *Roberts*, 177 U. S. 496, we said: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." These observations perhaps need some qualification. Undoubtedly where the jurisdiction of the Circuit Court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the constitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the Circuit Court of Appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the Circuit Court of Appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in section five may have so arisen that a direct resort to this court might be had does not deprive the Court of Appeals of jurisdiction or justify it in declining to exercise it.

In the case at bar, the jurisdiction rested on diverse citizenship. Two defenses were interposed, one of which asserted exemption from the license

tax, and the other denied the constitutionality of the legislation under which the tax was imposed. Both defenses were overruled, and judgment rendered for the plaintiff. The case was then carried on error to the Circuit Court of Appeals, which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the court erred, and that a certiorari should issue that its judgment to that effect may be revised. As the record is before us on the return to the rule hereinbefore entered, and full argument has been had, it will be unnecessary for another return to be made to the writ, or further argument to be submitted.

Writ of certiorari to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause.

Mr. Justice GRAY concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.